University Studies—No. 5.

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·020/4

THEORY OF ADOPTION.

J. C. Ghose's
Research Prize Essay in Comparative
Indian Law for 1903.

BY

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Calcutta:

PUBLISHED BY THE CALCUTTA UNIVERSITY AND PRINTED
AT THE BAPTIST MISSION PRESS.

1909.

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Theory of Adoption.

"There is a singular disproportion between the space necessarily devoted to adoption in the English works on Hindu Law, and that which it occupies in the early law books. One might read through all the texts from the Sutra writers down to the Dayabhaga without discovering that adoption is a matter of any prominence in the Hindu system" (Mayne, para. 103, sixth edition). In the Manu Smriti itself there are only 4 verses relating to the subject of adoption: they are 141, 142, 159, 168, chapter IX. Of these verse 168 defines the adopted son, while 159 mentions him as one of the six who are heirs, and verses 141 and 142 speak of his leaving the natural family and of his inheriting in the adoptive family, and performing ceremonies to the adoptive parents. In all the other treatises the subject does not occupy larger space, even down to the very recent time when the Dattaka Mimamsa and the Dattaka Chandrika, the two special treatises on adoption, were written. Hence the question naturally suggests itself to all thinking minds, as to what is the origin and nature of this institution of adoption and what is the reason for its gradual development. The theories that have been started with regard to this subject, of course, basing them generally on the authoritative statements of the Smriti writers, may be mentioned as being two-fold. The first theory is what has been denominated the religious theory of adoption, which says that on account of the great importance of the son in the performance of ceremonies for satisfying the ancestors, even in the very early days of the history of the Hindus, a son was considered to be indispensable for every man, and hence when a man had no sons, he satisfied his religious craving for a son, by affiliating a stranger to his own family. This may be characterized as the orthodox view. The second theory says that even in the case of Hindus religion was not the chief motive for the craving for a son, and that it is a vanity of human nature to see that his line is continued, while the origin of the institution itself is traced to a remote period when the existence of a son was a material help in swelling the number of male members in a family, and thus adding to its strength and power in withstanding attacks from outside. We have to examine what is the correct theory that can be deduced from the Smriti texts.

In the Manu Smriti the adopted son is described as follows: "He whom his father or mother gives, with water, in distress, equal, affectionate, he is known as the given son" (v. 168). Now it is admitted by all people that in the later times, the law of adoption was developed by the introduction of the religious theory, and that, therefore, at the present day adoption like marriage is essentially a religious act, and that it is purely and solely for motives of religion, the existence of property not being a condition precedent for the validity of adoption. Hence it becomes necessary for us to examine whether in the earliest times of our Smritis, the religious or the secular notion prevailed. It cannot be denied that every society must, previous to the development of religion and Godhead, have passed through stages of comparative simplicity and absence of intellectuality, and of irreligion and thoughtlessness about God and the future. And in those remote and semi-barbarian stages of society, any idea of religious merit is absolutely out of the question. In such cases if a family comes to the verge of extinction by the last male, he being an old and decrepit man, it may perhaps be that he would try to get hold of somebody to look after him during his old age, and consequently for the trouble of having done that allowed him to take whatever property the man would leave behind. But there would absolutely be no motive, apart from the probability or otherwise of the acceptability of such a fiction as sonship, for the old man to consider that the youngster whom he has secured is his son and will continue his lineage. Even if by the mere continuous contact and living together of the persons, a certain amount of attachment and affection grows between them, which must be naturally the case, there is no reason whatever for supposing that the deception of considering him his son and calling him like that, should also have taken place. The one can exist without the other. Hence it seems to me, that the view advanced by some jurists that the affiliation of sons is to a large extent based upon the original necessity of every family to be well-fortified and equipped with young men who not only support the older ones, but also protect them by preventing external attacks natural and perhaps common too in the early stages of society, does not fully explain *the fiction of sonship* that is at the base of the whole law of adoption. It, therefore, still becomes necessary to examine why even in those early stages of Hindu society at any rate, when adoption was in vogue, though not perhaps to the extent to which it has been subsequently or is at present, there was the fiction of sonship introduced. Some answer the question by saying that the vanity that is inherent in and characteristic of every man in the world, makes each wish and desire that his name should ever be known and spoken of in

this world by his line being continued, but even this answer does not strike me as fully explaining the reason for the introduction of the fiction of sonship, inasmuch as I cannot conceive of human nature restricting itself to this of all methods of satisfying its vanity, when there are numerous ways for such satisfaction. Hence arguing from the possibility of the case, it seems to me that much more potent and powerful influences than those should have been at work in compelling men to accept the fiction of sonship in even such early stages of society, and to lavish upon those who are utter strangers, completely known to be so, that family affection which is proverbially strong among us Hindus, and that influence I shall try to trace in the Hindu society with the aid of the materials furnished to us by the Smritis and other works.

In the first place, it is very necessary to exactly comprehend in what view and estimation a son was held even in the remote antiquity of Hindu society when the Vedas were written. In the Rig Veda it is said: "The wealth of the debtless suffices. May we be the possessors of such offspring," etc. These statements perhaps are not so clear as they ought to be, but I would draw attention to one more fact discovered by the aid of Philology, and that is the ancestral abode of the Aryans and their habits and manners. From the known and observed habits and customs of the Hindus and of the Greeks and the Romans, certain conclusions have been drawn, and a very remarkable one amongst them is that on account of the existence of the custom of ancestor-worship both in the Eastern and Western Aryans, ancestor-worship was a common feature of the original stock before separation. That ancestor-worship consisted in the propitiation of the manes of the ancestors by offerings and ceremonies at periodical intervals, and the idea had arisen that every man owed a debt to his ancestors and had to satisfy it by performing these duties for him. In the light of this view, the passage from the Rig Veda becomes clear. Possession of offspring is considered to be possession of great wealth, much more valuable than that of real wealth itself. Hence it is clear that in the Vedic society, the son was viewed as the most valuable possession in satisfying the debts due to their ancestors. This view is made still clearer by illustrations of events in the Vedas themselves. To take one for example:—Viswamitra was possessed of many sons, but they having been degraded on account of some act, he adopts a son Sunahsepa. Now it may very well be asked, on what ground could it be said that Viswamitra affiliated him as a son, when he already had so many sons, who are sufficient in number for the celebrity of the name, although by the fact of degradation they rather make it a notoriety. And the

irresistible answer seems to be that Viswamitra affiliated that son, because the others having become degraded and polluted, were unfit to fulfil and discharge the duties of a son. From the Vedic period, where we find ample evidence of affiliation for purposes other than merely secular, we may next come to the period of the earliest of law compilations extant, the Manu Smriti. It has been roughly placed by European scholars three or four centuries before Christ and refers to a period of antiquity. If we turn to the 9th chapter of this Smriti we find that the subjects of marriage, sonship, inheritance, &c., are treated therein. In this chapter, there are various and undeniable indications of the religious efficacy and of liability to ancestors. Verses 137 and 138 describe a son :—

पुत्रेण लोकान् जयति पौत्रेणानंतमश्नुते ।
अथ पुत्रस्य पौत्रेणब्रध्नस्याप्नोतिविष्टपम् ॥

" By a son he gets the worlds (heavenly), by a son's son he stays there endlessly, by the son's grandson he obtains the pleasure of the solar world " (v. 137).

पुन्नाम्नोनरकाद्यस्मात् त्रायते पितरं सुतः ।
तस्मात्पुत्र इतिप्रोक्तो स्वयमेव स्वयं भुवा ॥

" Because the son saves the father from the hell called Put, so he is termed Putra by Brahma himself " (v. 138).

These two verses place the matter of the son's efficacy in saving their ancestors from hell, beyond doubt. But to show that it was a matter of supreme importance religiously even at the time of the Manu Smriti, we will quote some more verses.

V. 107. यस्मिन् ऋणं न त्रयति येन चानं तमश्नुते ।
स एवधर्मजः पुत्रःकामजानितरान् विदुः ॥

" By whom the debt leaves, by whom the endless is got, he is the son born by a sense of duty, all the rest are known as children of love " (v. 107).

V. 106. ज्येष्ठेन जातमात्रेण पुत्री भवतिमानवः ।
पितृणामनृणश्चैव तस्मात्सर्वंस्वमर्हति ॥

" By the eldest son, as soon as born, a man becomes a father; he makes the father debtless, and he therefore deserves the whole."

It is not necessary to multiply instances, but I may refer to a Sruti quoted in the commentary on the above verse to the same effect.

[पुत्रेण जातमात्रेण पितृणामनृणश्चसः]

Having thus seen the religious necessity of a son in satisfying the debts to the ancestors of the father, we have next to notice the twelve kinds of sons and their characteristics. After describing the twelve kinds of sons in verses 159 and 160, he says in verse 161 :—

यादृशं फलमाप्नोति कुश्नवैः संतरं जलं ।
तादृशं फलमाप्नोति कुपुत्रैः संतरं तमः ॥

"What kind of fruit he obtains who wishes to cross the sea by the bad boat, that kind of fruit he obtains who wishes to cross the darkness by means of bad sons." This is an advice to every father to provide himself with sons of good qualities, who will consequently save the father from the darkness of hell. I need not quote *in extenso* the verses which speak of the different kinds of sons as being bound to offer oblations to their ancestors. I will only give the reference to a few of them by way of illustration, v. 132 and 140, as regards a daughter's son, verses 136, 139, &c. By far the most important verse is 180 which is as follows :—

क्षेत्रजादीन् सुतानेतान् एकादशयथोदितान् ।
पुत्रप्रतिनिधीनाऽहुः क्रियालोपात् मनीषिणः ॥

"These eleven kinds of sons the Kshetraja, &c., are said by the learned to be the substitutes of sons, as they make up the loss of religious acts." This is a clear pronouncement that these eleven kinds of sons are called substituted sons, not because they will simply celebrate the name of their supposed father, but because they make up the loss of religious acts due to the absence of a son, by their performing them ; and it is quite certain that according to Manu that was the object for which these sons were allowed. In the face of this verse it seems to me that it is absolutely impossible, to contend that the fiction of sonship by substitution was based on any principle other than the religious. Of course, in the case of the Kshetraja, Gudhaja, Kanina, &c., there seems to be no reason why the supposed father should be compelled to keep to himself a child who is not his, and I cannot pretend to bring myself to the view that with a full knowledge of the fact of illegitimacy, which is the same as the above kinds,

a father would allow the boy to be in his family or to be called his son. Now as regards the adopted son in the age of Manu.

"The Datrima son should never take the gotra, or the wealth of the natural father, the pinda follows the gotra and the wealth, and the religious ceremony (स्वधा) of the giver ceases." (v. 142).

This verse points out what material change is effected by the adoption of a boy from one family to another. The pinda ceases in the one, and commences in the other, and there is a complete change of paternity. In this connection it is also important to notice a verse that is ascribed by some to Atri and by some to Manu.

अपुत्रेण सुतः कार्यो यादृक्तादृक् प्रयत्नतः ।

पिंडोदकक्रिया हेतोर्नामसंकीर्तनाय च ॥

"By a sonless man should a son be made by one way or other with every effort, for the purpose of the pinda, the water, and other ceremonies, and for the celebrity of the name."

This verse brings most prominently to our view the very purpose for which a son is taken in adoption, and such a clear and unmistakable expression can but lead to one conclusion. Now it may be asked what is the purpose for which the celebrity of the name is mentioned. Is it merely the pleasure of having one's name celebrated or has it any religious significance? It seems to me that the religious necessity for the existence of a son for the payment of the debts to the ancestors having been established by independent verses, the fiction of sonship is made allowable on that ground, so that whatever strangeness might be found in the relationship with the new comer, it is entirely counterbalanced by that religious frame of mind which makes one think that it is absolutely necessary somehow to discharge the debts of one's ancestors, and that therefore for such purpose the person is to be accepted as a son; and being such he, by performing the ceremonies of the adoptive father's ancestors, celebrates their name, and by the fiction continues their lineage. The effect of celebration of name is not, to my mind, an independent effect produced by motives and causes outside the religious view of the matter, but is a proximate and direct result of the religious view and the consequent fiction of sonship. To view otherwise would be to invert what, in the natural course of things, is the relation of cause and effect. We next come to Vasistha and Baudhayana, who give the formalities of adoption after first laying down that a father or mother can give, that an only son can not be so given, and that a woman cannot give except with the consent of her husband. Vasistha says, "He who means to adopt a

son must assemble his kinsmen, give humble notice to the king, and then having made an oblation to fire with words from the Vedas, in the midst of his dwelling-house, he may receive, as his son of adoption, a boy nearly allied to him, or (on failure of such) even one remotely allied. But if doubt arise, let him treat the remote kinsman as a sudra. The class ought to be known, *for through one son the adopter rescues many ancestors.*" The key to the whole passage is the underlined sentence, and it goes fully to support our view of the question deduced from Manu. Then in Baudhayana the passage is similar except that the adopter receives the child with the words, "I take thee for the fulfilment of religious duties. I take thee to continue the line of my ancestors."- Strongly enough Mayne in his celebrated treatise quotes this passage for the position that the religious motive never excluded the secular, and he depends upon the last clause that was a secular motive. Such we have already explained was not probable on the true view of the things, and that even that clause in question is but a result of the act based upon the original religious theory.

It is not deemed necessary to mention Saunaka's Karikas at greater length than pointing out that the phrase **पुत्रच्छायावदंशुतम** has been made the origin of a number of restrictions which have grown in later days. The phrase means bearing the reflection of a son. Upon this the construction was placed by Nanda Pandita, that it meant that the boy should be such that he could have been begotten on his natural mother by his adoptive father through Niyoga and so forth. Although, as translated by Dr. Bühler and as pointed out by Mayne, the phrase is not really a metaphor, but only an expression which conveys the idea that the son after having been adorned, resembles a son of the adopter's body, still Nanda Pandita's construction of the passage has been universally accepted, as an authoritative exposition of the true view of the law on the matter in question, and is practically beyond dispute now. But it is not a little strange to observe that Nanda Pandita and the latter-day writers had introduced these restrictions upon adoption, when adoption still fulfils such an important duty and is so favoured. Still on a close examination of the question, his interpretation of it is capable of simple explanation, and that is this. Here is a matter of affiliation of a son, and what sort of man is he to be? You have a number of relations, and whom are you to select? Naturally the answer is that boy who would even otherwise be in a position to do the same ceremonies to men of the same degree as the adopter. His affiliation has the effect of transferring his religious acts to another line of the same degree, instead of the line in which the adoptee was born, or to explain the matter much

simpler the selection will always be in the agnatic line, and Nanda Pandita, well aware of the practice in daily life, propounds a rule whose effect is very nearly the same as that seen in actual practice, but which is based upon the single principle of capacity to beget by Niyoga and so forth. We had referred to Manu that a Kshetraja is to perform the ceremonies, and is the chief substitute, so does this son who is such a person as to be fit to be brought forth through Niyoga and so forth, thus establishing our original theory about the matter. "If the primary object of adoption was to gratify the manes of the ancestors by annual offerings, it was necessary to delude the manes, as it were, into the idea that the offerer really was their descendant. He was to look as much like a real son as possible, and certainly not to be one who could never have been a son. Hence arose that body of rules which were evolved out of the phrase of Saunaka, that he must be the reflection of a son. He was to be a person whose mother might have been married by the adopter, he was to be of the same class; he was to be young that his ceremonies might all be performed in the adoptive family: he was to be absolutely severed from his natural family and to become so completely a part of his new family as to be unable to marry within its limits. His introduction into the family must be a matter of free will and love unsullied by every mercenary element." (Mayne, para. 94.) From these things it is, therefore, clear that the origin as well as the development of the law of adoption has been wholly and completely on religious lines. I only wish to refer to the views of Mahmood, J., one of the most distinguished of Indian Judges, and who, from his being a Mahomedan, is not apt to be led away by the supposed religious motives of Brahmanic faith, and whose mind is consequently unbiassed. In 9 All., p. 287, in the leading case of Ganga Sahai *v.* Lekraj, he says: "Under these circumstances, the consideration of this point has been with me a matter of great anxiety, for I feel that the conclusions at which we arrive in this court on this point will effect one of the most solemn rights which the Hindu law confers upon childless Hindus, *whose religious feelings have given rise to the institution of adoption itself.*" ....." Under the Hindu system the beatitude of a deceased Hindu in future life depends upon the performance of his obsequies and payment of his debts by a son as the means of redeeming him from an instant state of suffering after death. The dread is of a place called Put....." Then in 12 All., at p. 380, we have from the same learned Judge: "The devolution of inheritance upon an adopted son is a mere incident flowing from the fact of the adoption, and I am unaware of any authority in Hindu Law which lays down that the possession of property is a condition precedent qualifying the powers of the adoptive

parents. Nor am I aware of any authority which would justify the view that the spiritual salvation of childless Hindu is less important in the case of a separated member. If this is so, and *if it is also true that the solitary foundation of the Hindu Law of adoption is the spiritual benefits to the soul of a childless Hindu, &c.*'' These passages clearly show that this eminent jurist considered adoption as having been entirely based upon the religious theory. As regards this question under discussion, the subsequent works simply quote the above texts and amplify them, adding some more restrictions, but none of them deviates from the religious view.

Again the existence of the Dwyamushyayana form of adoption also seems strongly to point to the same conclusion. It seems extremely strange why, if the sole motive for adoption, be a secular motive, there should ever have existed, from such a great length of time, a form of adoption whose very purpose is only to perform the religious ceremonies and take the property (not *contra*) of the adoptive father without the son leaving his own natural family, thus leaving no scope for the celebrity of the name of the adopter's family in the purely secular sense. I cannot but think that it was purely introduced to make up cases where a Dattaka could not be obtained, by providing special measures for the religious ceremonies of the deceased continuing. We have ere this referred to the fiction of sonship. That involves a complete change of paternity, a giving up of the natural parents, and taking up the adoptive parents as the real parents, which is the keystone to the whole law of adoption, and which to my mind appears to have been a direct outcome of the necessity of offering oblation to the ancestors of the adoptive father.

ADOPTION OF AN ONLY SON.

Till very recently the subject of adoption of an only son was one on which the lawyers of the various parts of India had held different views, and consequently also the decisions of the various High Courts were different. The whole difficulty of the question was consequent upon the facts that the sayings of the sages are of two classes, some creating legal obligations, and some creating moral obligations only, that such a distinction was present to the minds of the Smriti writers themselves, and that they consequently wanted the former kind of precepts to be mandatory, while they wanted the latter only to be recommendatory. Therefore, the real question in the present case reduces itself to this, *viz.*, whether the prohibition of the adoption of an only son contained in Saunaka, Vasistha and Baudhayana is only a recommendatory one or a mandatory one. It is proposed to consider the law as

contained in the smritis, the views of the commentators thereon, and of English lawyers, and the decisions of our judicial tribunals.

In the earliest original treatise on law, the Manusmriti, there is nowhere to be found, at least in the redaction that has come down to us in the shape in which it is, a prohibition against the adoption of an only son. In fact if we go through the whole of the Manusmriti we find only four verses relating to the subject of adoption. From this Mayne has drawn the conclusion that the law of adoption occupied a very insignificant place in Manu, and that it was rarely, if ever, resorted to for the purpose of providing a man with a son. From the fact that no mention whatever is made of the prohibition of the adoption of an only son in Manu, Edge, C.J., and Knox, J., in 14 All., and their Lordships of the Privy Council in the appeal from that case, inferred that Manu never did prohibit such an adoption, and that therefore the prohibition of the latter-day writers was a mere appeal to the moral sense, and was not in any way to be construed as legally binding. We will elsewhere discuss this view of the Allahabad High Court, which was accepted by the Privy Council, but it will be sufficient here to state our conclusion. Such silence of Manu does not lead to the conclusion that the matter was never prohibited at all by Manu, even from a moral point of view, or to the conclusion that even if such a prohibition were to be found in the original composition, it was expurgated in the subsequent editions as a precept of no practical application whatever. For if in the original composition no such prohibition was incorporated, there is no more reason for supposing that this was due to the fact that Manu did, by implication, allow such a thing, than for supposing that such a prohibition was omitted as Manu did not contemplate any such adoption at all, specially in view of the comparative insignificance of the law of adoption in his days. The idea of the necessity of sons is not one that has been recently started after India has come under the Brahminical influence, and after the religious theories have been started in connection with all secular acts, but it is an idea which has been common in the most ancient Hindu community about the ideas and traditions of which we have any evidence left now. To substantiate this statement, reference need be made only to the following passages. "परिधत्तं धत्तणस्यैकवो नित्यस्यायः पतयः स्यामः" "The wealth of the debtless man suffices. Therefore may we be the possessors of such wealth which has not to be given back." *Rig Veda.*—Vasistha quotes the following passages from the Vedas: "Endless are the worlds of those who have sons; there is no place for the man who is destitute of male offspring." Then, "May our enemies be destitute of

offspring." "May I obtain, O Agni, immortality by offspring." Such being the case, it is clear that in a stage of society when the pristine habits of ancient Hindu Society were unsullied by intermixture of foreign and aboriginal usages, nobody would have parted with an only son, whose efficacy in saving his ancestors from hell was very great, apart from the secular reasons that make the possession of a son a really advantageous thing to the parents in those early times where practically might was right. Hence no inference one way or the other being deducible from the fact of the omission of such a prohibition in the earliest text-books, we now turn to those Smruti writers who express a distinct prohibition against such adoptions. The Smruti writers that have a distinct prohibition against the adoption of an only son, are Vasistha, Baudhayana, and Saunaka, around whose precepts the greatest controversy centred itself. Vasistha discusses this question in Chapter XV, verses 1-5, and then continues to give the formalities of adoption in verses 6-10.

The verses relating to an only son run thus : "**नैकं पुत्रं दद्यात् प्रतिगृह्णीयाद्वा स हि संतानाय पूर्वेषाम् ॥**" We next come to Baudhayana, who in his Parisishtha Prasna VII, Adhyaya 5, has dealt with this in verses 1-6, and he equally prohibits it. The next Smruti writer who prohibits such an adoption is Saunaka. He says in his Saunaka Smruti '**नैकपुत्रेण**' etc. It may at once be pointed out that in the other Smruti writers nothing whatever is to be found about this, either because no such prohibition was expressed by the sages, or because such a prohibition was, if expressed originally, dropped out in the redactions that have come to our hands, we are not in a position to say. Whatever that might be, the fact is that those who are against the validity of such an adoption depend upon the statements of the above sages, while those who are for its validity have no other sages to depend upon and try to explain away the distinct prohibitions contained in Vasistha, Baudhayana and Saunaka. Next, coming to the commentators, we find Mitakshara, Chapter I, Section XI, 9-12; Dattaka Mimamsa IV, 1; Dattaka Chandrika, Section 1, v. 29; Dattaka Nirnaya, Jagannatha's Digest II, 837, referring to the same matter. Now having thus before us the original Sanskrit authorities that have any reference to the subject under discussion, we next have to see what is the real meaning, and not the apparent meaning only, of these prohibitions. It may also be noted that this subject received a thorough and exhaustive discussion at the hands of V. N. Mandlik and G. C. Sircar, two very able men who have combined Sanskrit scholarship with legal attainments, and whose opinions in a very great degree influenced the minds of the tribunals in the most recent cases,

the decisions in which on appeal to the Privy Council have settled the law so far as the practice of it is concerned in India. The late Rao Saheb V. N. Mandlik discusses the original authorities bearing on the question at pages 496-508, and the case law bearing on the subject at pages 510-514 of his book. He first gives his conclusions on the question, by saying that "the said texts must be regarded purely as laying down a recommendation based on obvious worldly reasons, and nothing more. He considers the text of Saunaka first which says, "नैकपुत्रेण कर्तव्यं पुत्रदानं कदाचन। बहुपुत्रेण कर्तव्यं पुत्रदानं प्रयत्नतः॥" which is translated by Mandlik thus, "One having an only son should never give him in adoption; one having several sons should give a son in adoption with every effort." It should be noticed here that this translation is a slight departure from what the words प्रयत्नतः are understood to mean by Nanda Pandita, and from the translation of the word by Sutherland and Borradail, who turn प्रयत्नतः into "on account of difficulty." Mandlik points out that no other commentator has taken that view, and that the natural interpretation of the word must be taken; and I think the translation of Mr. Mandlik is the more correct one, being almost literal except that instead of the passive voice in the original, the active voice in the translation is used. Now his line of argument with regard to the verse is this. The predicate is कर्तव्यं which may severally be translated into should be done, or must be done, or is proper to do. So that that word by itself is incapable of deciding whether the prohibition or order requiring it to be done is mandatory or recommendatory. But as it occurs in two halves of the same verse it must be translated in the same way in both the halves. Then he goes on to say that the correct translation is "should be done" and not "must be done." His argument for this conclusion is that if you take the first hemistich to involve a peremptory command, it should follow that the latter too should be regarded as a peremptory order. But this supposition involves the following anomaly, that if the latter proposition be true, it follows that any man can compel his neighbour having many sons to give one of them in adoption to him by a suit at law; and he also strengthens his conclusion by arguing that if the command in question were a peremptory one, a disobedience of it ought at the least to be visited with a penance, and that no such visitation is ever mentioned in any of the Smrutis or digests. He further fortifies his position by what I may be permitted to call the juxtaposition theory, a theory which says that if a number of precepts occur one after another, and there is nothing whatever in any precept itself to differentiate it from

the rest, all the precepts must be taken to be of the same nature of obligation. Mandlik refers to Saunaka karikas quoted above and says the following are the precepts laid down by Saunaka :—

(1) The adopted person should ask for a son.

(2) By the Brahmanas, reception of a son should be from Sapindas.

(3) In the absence of him, from Asapindas.

(4) In all classes, it should be from amongst the respective castes ; and not from elsewhere.

(5) One with one son should not make a gift of a son.

(6) One with many sons should make the gift of a son with every effort.

He says all these are equally recommendatory and there is no reason for holding one more obligatory than the rest. And moreover he finds another fact positively showing that such an adoption was not considered by Saunuka himself to be invalid, as he refers to No. (4) alone of all these and says that a disregard of the rule creates a partial disability and the adopted is entitled to maintenance, if not to a share, and his adoption stands, and this liability to maintain the adopted boy of a different class, Mandlik says, is a penalty which is attached to No. (4) only and is not found in the other instances, and hence the rest too are merely recommendatory. As regards the above couplet of Saunaka, Mr. Golap Chunder in his book on adoption says, that the word कर्तव्य in a verse, indicates the rule to be recommendatory, for according to the authority of Dayabhaya, Kartavya in a precept prescribes a religious and not a civil duty, and he also says that both the hemistichs should have the same force, and that as you cannot compel a man to give away one of his three sons, so you cannot compel a man to retain his only son to himself.

The first point to be noticed with regard to the interpretation of this verse by Mandlik and Sircar is that both the writers ignore the distinction between positive and negative duties unattended by any other conditions or limitations. When a certain act is prohibited by law, the mere doing of the act creates a breach of the prohibitive injunction, and there is a precept broken. But in the case of a precept which says that a particular act should be done, there being no limitation or condition that the act should be done within a certain time or at a certain place, or otherwise, the precept is not broken, and the act may be done as long as there is capacity in the person to do the act. That being so, to say that two precepts inculcating positive and negative duties, or acts and forbearances, should be treated as being of the same nature and should be construed in the same way is

to miss the chief and obvious distinction that underlies jurisprudence. Now the first part " नैकपुत्रेण कर्तव्यं पुत्रदानं कदाचन " is a precept containing a forbearance, and the law is broken as soon as the act is done. But the second half बहुपुत्रेण कर्तव्यं पुत्रदानं प्रयत्नतः is a positive precept which inculcates that a certain act should be done; and this precept, assuming it to be of the same nature, is not broken as long as the person is living, for he can still give in adoption. In the former as soon as the act is done, the precept is broken, and the act done in contravention of the precept is not valid, and will be set aside. But in the latter case, a man is capable of giving his child in adoption as long as he lives, and the mere fact that he does not do so within a certain period is not an infringement of the rule, as there is still the possibility of his doing so as long as he lives, there being no limitation of time, place, or manner for the exercise of such power. Of course the above reasoning proceeds on the ground that both rules are obligatory, but on a little reflection it is clear that a rule of the second kind cannot from its very nature be obligatory. Because, every duty corresponds to a right inherent in some person or persons, and the failure or non-performance of the duty gives rise to an infringement of the right inherent in him, and thus gives him what is technically termed a cause of action. In the case of the rule under discussion, namely that in the second line of Saunaka's verse, it is impossible to say, as Mr. Mandlik himself rightly observes, that anybody else in the world can compel a man to part with one of his sons in adoption, nor even by the greatest stretch of imagination can it be said that such a power of compulsion exists in the ruling power, as there is not the least idea of public benefit, public good, or public utility to support such a view. Nor again can any action be maintained against the man, assuming there is some person who can sue, before he exercises the power of giving away a son, as it is not possible to say that he will not do it. Hence from the very nature of things, even if such a rule is to be made obligatory, it follows from the elementary principle underlying the very notion of " law " that such a " law " can never be enforced, and as an unenforceable law it cannot therefore be obligatory. Therefore, to say that the meaning of the word कर्तव्य in the latter part of the verse should also be ascribed to the word in the former would be without any foundation, for in the case of the second half, from the very nature of the duty inculcated, and of the principles underlying the conception of law, it is impossible to say that that rule is obligatory ; so कर्तव्य having two meanings, and being used in such a case, must necessarily have only one

meaning, and that is the permissive one. Hence the preferability of the recommendatory sense of the word not being due to itself, but to the particular nature of the precept itself, the reasoning that whatever meaning is to be given to कर्तव्य in the latter half, should be given to it in the first half falls to the ground, and the meaning of कर्तव्य in the first is to be ascertained with reference to that sentence itself. Now that being so, the spirit of the sloka is to be noticed in connection with the interpretation of the first half, and that is one of antithesis between the two cases. The first relates to the case of an only son, the latter to the case of a man having many sons ; the first relates to not giving, the second relates to giving; and last and certainly not the least of the antithetical phrases in the two parts, whose very presence seems to have been entirely ignored, and whose force consequently unappreciated by the two learned writers above mentioned, are the two words कदाचन in the first and प्रयत्नतः in the second, words which are translatable into "never" and "by every means," and which being adverbial words modify the meaning of Kartavya so that the predicates are variously कदाचन न कर्तव्यं and प्रयत्नतः कर्तव्यम्. To my mind the very existence of these two diametrically opposite words in the two halves, in connection with the antithesis sought to be conveyed by the opposite ideas in the two lines, clearly gives to the two parts in which the words respectively occur, meaning and binding force which are also diametrically opposite and antithetical, the first thus meaning that you should never do the first thing, while you should try your best to do the latter. When it is said that you should try your best to do a thing, it is quite clear that the legislator himself contemplates the possibility of the precept being broken, after one had tried his very best, while in the case of the first part "never do," he contemplates that the rule should never be broken, and in general consonance and agreement with the scheme of the sloka, we cannot but give to the word कर्तव्य in the first half, a meaning which is exactly opposite to that which it bears in the latter half. What I have already said, is made almost conclusive by the two words कदाचन and प्रयत्नतः thus giving to the two sentences two entirely different meanings. This view of mine is strengthened from a consideration of the following passage from the judgment of Knox, J., "Vasistha can give a very imperative direction, and does do so by using after the optative दद्यात् the adverb अवश्यं, pp. 123-124, 14 All. Now कदाचन and प्रयत्नतः are also similar

adverbs modifying कर्तव्य which corresponds to दद्यात्, the former making it imperative, and the latter directory, the effect being heightened by the sharp contrast between the two. We may also dispose of the remark of Mandlik that no penance is attached to a breach of this duty. We need only add that that refined legal sense which is attributed to the Smritikars by which they distinguish between religious and legal precepts, even when they are given side by side, also makes them perceive that no religious punishment is necessary, as the legal punishment of invalidating the act is sufficient. In this view, such absence goes to support the theory that the Smruti writers considered it to be peremptory rather than recommendatory, legal rather than religious. We next come to what we have in an earlier part, called the juxtaposition theory. Mr. Mandlik's argument on this point, to my mind, seems to be based upon a misconception which, as has already been noticed, led him to give to कर्तव्य the same meaning, as it occurred in two different halves of the same verse, and in this case too the argument can be disposed of by noticing the fact that the precepts mentioned under six heads by him are not all of the same nature, nor do they refer to the same question as regarding capacity, or qualification, or status, but are a number of rules which are conveniently collected together as referring to one and the same subject, namely, the gift and acceptance of a son in adoption, and in such a case it would be unphilosophical to say from the mere fact of sequence that all have equal force and are or are not equally binding. Rules 1, 2, 3 clearly refer to what Mr. Justice Mahmood called formalities and preferences in matters of selection which are entirely beyond the pale of legal obligation. Again from the statement that a partial disability is attached to disregard of No. (4), namely, selection from the caste only, he infers that this rule alone is sought to be distinguished from the others. No doubt that is so as regards the particular effect that it produces, but the very fact that he mentions that the adoption stands, although with a partial disability, with regard to the rule exactly preceding the rule in question, seems to me to be proof that he wanted to differentiate its effect from that of the other, and thus signify that the exceptional effect of rule (4) is the above-mentioned, while in the case of rule (5) no such result can happen on the very principle *expressio unis*. Nothing further need be added to refute the position of Sarcar except that in giving to the word कर्तव्य a recommendatory meaning only, on the authority of Dayabhaga, he stands alone, being controverted by Mandlik and by Mr. Justice Knox. We next have to direct our attention to the texts of Vasistha and Baudhayana prohibiting

the adoption of an only son, and before entering into the question of the construction of these two texts, it becomes necessary to consider two or three questions relating to rules of construction that have arisen in this connection, and about which much difference of opinion seems to have existed. The questions that have to be determined are :—

(1) How far do the rules of interpretation contained in the Purva Mimamsa of Jaimini apply to the construction of legal precepts ?

(2) If they do, does the rule that the mention of a reason makes the rule only recommendatory supposed to be applicable to matters of sacrificial ritual also apply to the construction of legal precepts ?

(3) How far and in what cases does the maxim ' *Factum Valet quod fieri non debuit* ' apply ?

On the first question we have the authority of that eminent lawyer and scholar Mr. H. T. Colebrooke, who at p. 342 of his miscellaneous essays says, '' The disquisitions of the Mimamsa bear a certain resemblance of juridical questions, and, in fact, the Hindu law being blended with the religion of the people, the same modes of reasoning are applicable, and are applied to the one as to the other. The logic of the Mimamsa is the logic of the law ; the rule of interpretation of civil and religious ordinances ; each case is examined and determined on general principles ; and from the cases decided the principles may be collected. A well-worded arrangement of them would constitute the philosophy of the law ; and this is, in truth, what has been attempted in the Mimamsa.'' Dr. Siromani in his commentaries on the Hindu Law, ed. 1885, has, at pp. 47-54, discussed the mimamsic rules of interpretation and says, '' Many of the rules are derived from the Mimamsa Darsana and the karikas of Bhattapada. There are also some rules which are based on grammar ; while there are some which are tacitly recognised by Hindu jurists.'' The subject is also dealt with by Golap Chunder Sirkar, on adoption, at p. 74, quoting Colebrooke, and also in the most recent work in Hindu Law, that of J. C. Ghose, who discusses the question in the appendix at pp. 739-742. As a result of the views of the above-named jurists it may be taken that the rules of Mimamsa were intended primarily for the use of religious and ceremonial precepts, and secular precepts also being mixed up with religious, some of those rules have been made use of by the commentators in the interpretation of certain secular and legal rules. From an examination of the rules quoted by Siromani as having been applied to the construction of legal precepts, we find that they are all rules which natural logic and common sense

suggest, and hence their application to strictly legal precepts is based to a large extent upon this principle also. Hence it seems to me that such of the rules as have been approved by Sanskrit jurists and made use of as also being applicable to the construction of legal precepts can be applied, and that all other rules of the Mimamsa should be carefully considered as regards their nature and applicability, before they are made use of with regard to legal precepts.

We next come to the question how far the rule, supposed to be contained in the Mimamsa about precepts with a reason, can be applicable to the construction of a legal precept. The texts of Vasistha and Baudhayana under consideration are identical and run as follows: "न त्वेकं पुत्रं दद्यात् प्रतिगृह्णीयाद्वा। स हि संतानाय पूर्वेषाम्." As regards this text it has been said by Mandlik and Sirkar that it is a well-known rule of the Mimamsa that whenever a rule is followed by a reason, the rule ceases to be obligatory and is only recommendatory.

In the view that we have taken of the general applicability of the rules of interpretation it becomes necessary to examine whether the rule has ever been applied by any commentator, or whether there is anything in the nature of the rule itself which accords with natural logic, or which makes it necessary or equitable to apply it to legal rules. Now as regards the first question, the rule in question seems nowhere to have been applied by the Sanskrit commentators to the construction of a rule of law. Although Mr. Mandlik says that Kubera and Nanda Pandita approve of the principle and apply it on an examination of Nanda Pandita it will be seen that he simply says the rule contains a reason and says nothing more. I have therefore no doubt that Nanda Pandita had not the remotest conception of such a rule when he was discussing the adoption of a brother's only son by a brother in D.M., Section II, 38, which says as follows, "And hence from the sanction of the gift, of an only son, even in the present case, there is no room for the application of the prohibition. For, since, as propounded in the sequel of this text, assigning the reason (for he is destined to continue the line of his ancestors) the continuation of the line of his ancestors is completed, by means of a son, although common to two brothers: it is established that the prohibition in question refers to persons other than brothers." It is impossible to find how Nanda Pandita in this verse tacitly accepts the existence and applicability of any such rule of interpretation. On the other hand he is labouring to steer clear of the prohibition under question, in the case where the only son of one brother is given in adoption to his brother in the Dwyamushyayana form as the son of both,

the validity of which Nanda Pandita already established by a text of Manu, and goes on to say that the prohibition does not apply to the particular case, as it is based on an express text of Manu, and also because the act is such that it does not go against the reason for the prohibition contained in the rule, and thus establishes that the prohibition extends only to cases other than Dwayamushyayana adoption of a brother's son. If it could be said that Nanda Pandita recognised the existence and applicability of such a rule of interpretation, it would have been much simpler and easier for him to have mentioned the rule and to have said that the reason being given, it is not obligatory and hence the act may be done, than to do what he has done, *viz.*, to try to bring the case out of the prohibition in this round-about way. To my mind Nanda Pandita seems on the other hand to assume that every word of the text, the rule as well as the reason, is equally binding upon us, on the well-known principle of interpretation common to all systems of law, that due effect should be given to each and every word in a text of law ; and in fact in the passage relied on by Mr. Mandlik Nanda Pandita says that as the reason of the rule, *viz.*, continuation of lineage, is not affected by this mode of adoption, the rule is not broken, thus implying that the rule as well as the reason, every word of it, is equally binding, and he establishes that the particular case neither breaks the rule, nor the reason for the rule. See also Dat-Chan., Sect. v. 27 and 28.

Having therefore seen that, so far as is known, the rule in question has never been pressed into service by any commentator till now, it becomes necessary to see whether the two learned authors are entitled to propound the rule as one of universal application in construing texts of law. It should be particularly noted that Dr Siromani, who gives 27 rules of interpretation, never mentions this as one of those, although this form of expression is pretty often met with in our Smritis, and that none else of the modern text writers ever thought of the existence of such a rule before these two learned authors have evolved it. In considering this question, I cannot do better than quote the admirable criticism of Mr. Mayne at pp. 35, 37.

"The rule, if finally accepted as a governing principle of interpretation, would be of such a far-reaching character, that it may be advisable to examine whether such a novel and disturbing element should be added to the difficulties which already encompass every discussion upon Hindu Law. It must be admitted that the rule does not carry its own evidence with it, like a rule of grammar. Nor can it be shown that it was ever accepted by the Rishis, to whose words it is applied, or that it was thought of by anybody before it was evolved by Jaimini.

Nor can it rest on his personal authority, unless it can be shown that it has received general acceptance as part of the law of the country. And here it is remarkable that during the present century, no previous instance can be produced in which it has been relied on by any Pundit, or Vakil, or Native Judge, though numberless cases must have arisen in which it would have settled the controversy. It must, therefore, rest upon some obvious accordance with natural logic, and must apparently harmonise with the style of the early sages. In the case of a merely earthly Judge, if he states a rule of law without anything more, his statement carries with it exactly the weight due to his authority. If he proceeds to say why he states the law to be so, his reasons can be discussed and rejected. But in the case of the early sages, who are either themselves Divine, or are speaking the language of the Deity, every word, whether rule or reason, is equally inspired, and is entitled to equal respect. [See Nanda Pandita's explanation of Dwayamushyayana quoted above.] It is still necessary to put a construction upon the words, and to see whether the speaker intended to order, or to advise. But it is difficult to see how an apparent order, which it is impossible to disobey, can be deprived of its character because it is followed by a reason, which it is impossible to dispute. The second branch of the test would involve an exhaustive examination of all the Smritis. A few instances, however, lie upon the surface, which suggest a doubt as to the practical value of the rule. Probably the earliest Rishi, who spoke of a widow as heir to her husband, is Vrihaspati. He states her right distinctly and positively, and then follows it up with the very satisfactory reason—"Of him whose wife is not deceased half the body survives. How should another take the property, while half the body of the owner lives?" So Manu gives a reason for the position which he assigns to the son of an appointed daughter, and to the son of an ordinary daughter (z). No one, I suppose, doubts that these texts are mandatory. It is also to be remarked that, when a commentator cites a text which contains a reason, he generally leaves the reason out, as for instance, in quoting Vasishta as to the adoption of an only son, and Vrihaspati as to the succession of a widow (a). This would indicate that he did not suppose that the reason nullified the text. Apparently the reason was intended to strengthen the injunction, where the sage was stating a rule which had not been laid down by his predecessors. It is probable that Jaimini's principles of interpretation, which were intended to elucidate Vedic ritual, are incapable of universal application to secular law."

But what seems to me to be certainly very remarkable is the authority cited by Mandlik for the rule in question. He

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refers us to an Adhikarana constructed by Sabaraswami on 4 Sutras of Jaimini which Mr. Mandlik calls the Hetumannigadadhikarana (which means a chapter dealing with texts *which have or contain a reason*). But I have examined the Mimamsa Darsana published by Pundit Jibananda Vidyasagar at Calcutta in 1883, in which the Adhikarana is contained at pp. 57-60; I have also examined the Shastra Dipika of Parthasaradhi Misra, which is also a similar commentary on Jaimini, published at Benares in 1861 under the Editorship of P. S. Rama Misra Sastri, and I have also examined the Jaimini Nyaya Mala, a remarkable work of the great Madhavacharya, who at the time he wrote the work was a Swamin and was known as Vidyaranyaswami, and whose legal work Madhaviya is an authority in Southern India and is referred to by the Privy Council in the Ramnad case, printed in Telugu characters in Vizagapatam by Sri Paravastu Srinivasa Rangachariar Maha Mahopadhyaya. In all these three works the Adhikarana is termed the *Hetuvannigadadhikarana*, which is entirely different from *Hetumat*. Mat is a suffix which means 'containing,' whereas Vat is a suffix which denotes appearing like or resembling. It is clear, therefore, that the Adhikarana refers to texts which appear like texts which contain a reason. This is also rendered more probable by the previous Adhikarana being the Vidhivannigadadhikarana. When all these three texts coincide in reading it as *Va*, I wonder how Mr. Mandlik could find *ma* in the Bibliotheca Indica edition. I have not got that edition before me, but I have no doubt that even in that *Va* alone will be found. Mandlik's zeal for establishing the rule perhaps made him misunderstand it as *ma*. Mandlik translates the first passage of the Adhikarana from Sabara Swami, *viz* :—अथ ये हेतुवन्निगदाः शूर्पेण जुहोति। ते नहि अन्नं क्रियते इत्येवमादयः तेषु संदेहः किं स्तुति तेषां कार्यं उत हेतुः। into—"Now in regard to such Nigada texts having a reason, one should sacrifice by means of a surpa, for by means of that food is prepared, a doubt arises as to whether they are simply commendatory or contain a reason (making them obligatory)." Now in addition to the initial mistake of misunderstanding the nature and application of the Adhikarana itself, which mistake consequently vitiates his whole view, there are mistakes in this rendering of his. It is not Nigada texts having a reason, but Nigada texts that resemble those having a reason, again स्तुतिः is not commendatory (an adjective form) but praise, and lastly the portion of his rendering within the brackets is nowhere found in the original, and is an addition of the translator, but unwarranted by the state of the original text. But I am unable to understand what he means by the addition. If he means

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that by containing a reason the text is made obligatory, it is fatal to his own view. If he means the clause contains a reason and is still obligatory, it will be conceding that even in the case of clauses containing a reason, there are some which are obligatory. The true translation seems to be, "Now in the case of texts which read like हेतु, 'one should sacrifice by means of a surpa, for by means of that food is prepared,' a doubt arises whether it is praise or reason." The final conclusion of the Swami too is mistranslated. It is तस्मात् हेतुवचिगदस्यापि स्तुतिरवकार्य्य rendered by Mandlik into "Therefore the import of the texts having a clause that assigns a reason is commendation only." Here it should be noticed that the word अपि is entirely dropped, in addition to mistaking *Va* for *ma*. Hence the true translation is, "Even though it reads like a Hetu text, praise alone should be understood." Now the true meaning of the whole Adhikarana is this, "There are certain texts which are followed by clauses connected by the particle हि. Now हि is a Hetu introducing particle, and from the meaning of the text, their being cause and effect does not follow. Hence in such cases a doubt arises whether it is really a cause or whether it denotes praise, and in the case of such texts Jaimini comes to the conclusion that they should be construed as praise. This is entirely different from what Mandlik understands the passage to mean. Now the effect of construing it as praise is stated to be not that it makes the preceding text recommendatory, but it strengthens the prohibition previously contained in the text. The whole Adhikarana is a chapter which rather goes to show that there may be certain clauses that appear like reasons but are not really so, and they should be considered as denoting praise. It may, however, be asked, if that is the effect of praise why should it be constrasted with reason, and does not such contrast lessen the force of the prohibition. The answer to it is stated to be that whenever a Hetu is given, it may be inferred that all things that satisfy the relation of cause and effect may come under the text. But this inference is of no avail as against *an express text in words*, which particularises a thing. Hence that particular thing alone is to be accepted. I have with great care and attention studied the whole Adhikarana with the aid of a learned Pundit, and I have not been able to find that it, in any way, lends support to the theory of Mandlik. He then refers to the Sutra हेतु दर्शनाच्च in chapter I, Quarter III, Sutra 4, at p. 73, which, he says, makes the matter more clear. Unfortunately it does not at all touch the present question. That refers to a case of a text in the Sruti and of the consequent want of authori-

tativeness of the Smriti. It says, "There is the text of the Sruti" औदंबरोऽस्पृष्टः and the Smriti text यदभावेत् औदंबर्णः सर्ववेष्टनम् । is opposed to it, as the former says you should simply touch it, while the latter says you should completely cover it. In such cases the objector says, I am entitled to infer the existence of Sruti corresponding to this Smriti text. The answer is twofold: you cannot infer such a thing, because there is an express text to the contrary, and in the second place the motive or cause for the Smriti text is clear, for some people desirous of getting a new cloth, cover the Audambari with it completely, and that explains the Smriti text. In such cases there is no room for inference, and hence the Smriti text is no authority as against an express Sruti to the contrary. I have refrained from quoting the whole of Sabara's commentary, as it is too long and cumbersome, but I would quote Madhava's passage on this, as it is very short and fully and correctly represents Sabara's view. It should be noticed that on this point all commentators are agreed that the above is the only meaning, for in certain other cases Madhavacharya gives two or three views, while in this case he mentions only one, the above. On the whole it seems to me that there is no authority whatever for the very general and almost universal proposition that Mandlik lays down that whenever a text is followed by a reason, it ceases to be obligatory and is simply merely recommendatory. But it may perhaps be said that as in the case of the winnowing basket, if the following clause is really a reason containing one as saying by means of it food is prepared, all things by means of which food is prepared may be used for the sacrifice. But even in that case express words being stronger than inference, the former outweighs the latter, and the text should therefore be followed. Hence *a fortiori*, it cannot be said, that you may sacrifice with any vessel whatsoever. It seems to me, however, in the case of Vasishta's text, about which we are entitled to infer that there is a Sruti text to the same effect, that whatever view we may take of the Hetu rule, this text comes within the Adhikarana above referred to, as Mandlik himself admits that it denotes praise. It can therefore be very safely asserted, that on a true view of the Mimamsa rule of interpretation, the strength of the rule in question is not in the least diminished, the effect, if any, being in the way of strengthening it. This error of Mandlik has been a fruitful source of much misconception about the reason containing rule, and I think that if the Mimamsa be truly and correctly interpreted as above, the whole foundation for the theory falls to ground. When people who have a great reputation as Sanskrit scholars, make statements and give constructions of such abstruse and out of the way subjects like the one

in question, it is but natural that English Judges should accept those statements and constructions as correctly representing the law. The fault is not theirs, but lies with the people who without careful examination and deep study, give forth to the legal world theories which may be sufficiently mischievous to shake the whole fabric of Hindu Law to its foundation.

Next as regards *Factum Valet*, Dr. Siromani in his commentary on his Hindu Law says at p. 127: "Jagannatha is primarily responsible for the erroneous notion which has prevailed so long that the words वचनप्रते नापि वस्तुमन्यथाकरणाप्रकेः। D. II-30, are equivalent to the Doctrine of *Factum Valet*—the application of the doctrine to matters relating to adoption is altogether unwarranted, and unsupported by authority, and at pp. 192—194 we have a discussion of the rule, and Dr. Siromani comes to the conclusion that *Factum Valet* finds no place in Hindu

[Passage from Madhavacharya's Jaimini Nyaya Mala.

तेन ह्ययन्नमिति प्रोक्तो वा दो हेतुरत स्तुतिः।
हि नाश्रुता हेतु तातः शूर्पाद्यन्यत्वसाधनम्॥
शूर्पसाधनकाश्रौतीनाश्रौतैस्साविकल्प्यते।
अतो निरर्थकोहेतुस्तुति स्तुस्या त्प्रवर्त्तिका॥
तृतीयाधिकरणमारचयति।

इद मास्नायते शूर्पेण जुहोति तेन हि अन्नं क्रियते इति अयमर्थवादो विधेये शूर्पे हेतुत्वेनात्वेति हि शब्दस्य हेतुवाचित्वात्। यस्यादन्नसाधनं तस्माच्छूर्पेण जुहोति यमित्युक्ते यदन्नसाधनं दर्वीपिटरादिकं तेन सर्वेण होतव्यमिति गम्यते ततः पिटरादियोऽपि शूर्पेण सह विकल्पंत इति प्राप्ते ब्रूमः। शूर्पयज्ञोमसाधनत्वं श्रौतम्। तृतीयया तदवगमात्। पिटरादीनाम् त्वानुमानिकम् अतः असमानबलत्वान्नविकल्पोयुक्तः। ततो हेतुः व्यर्थः। स्तुति प्ररोचनायोपयुक्ता तस्मात् स्तुतित्वेनान्वयः॥

Law, and the doctrine of Jimuta Vahana, mistaken by some for *Factum Valet*, is only a truism which says that a text cannot alter the essential characteristic of a thing. The same subject

has been discussed by other writers at length, and here only reference need be made to them. Golap Chunder Sirkar on adoption at pp. 146—147, 150—153; J. C. Ghose, Hindu Law, pp. 368—369; Dr. Wilson's works, Vol. V, 74; and Mayne, pp. 196—198. Mr. Ghose considers that although *Factum Valet* has no place in Hindu Law as pointed out by Siromani, yet Jimuta's getting over the prohibition cannot be defended on any principle other than that akin to the doctrine of *Factum Valet* in English Law. Golap Chunder Sirkar lays down that where there are legal and moral prohibitions, a breach of any moral prohibition cannot be supported on the ground of *Factum Valet*, and an act done in contravention of the moral prohibition, is still valid when done, thus pre-supposing that the act is only morally prohibited. Mr. Mayne in his admirable work discusses the doctrine at pp. 196—198, and says in Section 156 at p. 198 that "the above principles give no help in a case in which it is possible to hold different views on the question, whether a particular direction is, or is not so imperative as to be of the essence of an adoption. For instance not only different courts, but the same court at different times, have disagreed as to the applicability of the doctrine of *Factum Valet* to the adoption of an only son."

From these authorities it is quite clear that the doctrine of *Factum Valet*, whether it finds a place in Hindu Law, or whether it is engrafted on it as one of the principles of universal jurisprudence, is capable of application to cases only of a moral prohibition and not of a legal one. Of course, it will be absurd to say that when a certain act is legally prohibited from being done, it is still not invalid after it is done, on the strength of *Factum Valet*. If that be so every legal precept can be broken with impunity, and the doctrine will be of universal application in supporting breaches of legal rules. No doubt, as has been stated, "a text has only an invisible effect," and it cannot prevent illegal acts from being done in the sense that it does not offer any physical obstruction to the perpetration of the breach of the precept, but what a legal rule can do and will do, provided it is of the nature it purports to be, is to invalidate the act, to treat it as not done at all in the eye of the law, although in fact it is done. And in cases where the act comes under the definition of crimes, the State provides a punishment therefor. "Nothing is too heavy for a text," and in the eye of the law, the action is invalidated, by the *Factum* of it being supposed to be non-existent. Hence it is clear that this doctrine can be applied to the present question only after we have arrived at the conclusion that Vasistha's and Baudhayana's prohibition is only admonitory and not mandatory, and I may also state, that if

we arrive at a different conclusion, the doctrine of *Factum Valet* will be utterly useless and quite incapable of application to the question under discussion. The text of Vasistha, which is also the same as that of Baudhayana, is as follows, and the passage in which it occurs may be given as follows :—

यथादायादबंधूनां सहोढ एव प्रथमः। दत्तको द्वितीयः। यं मातापितरौ दद्याताम्॥ यस्य पूर्वेषां वसाम् न कश्चिद् दायादः स्यादेते तस्य दायं हरेरन्निति।

श्रोत्रियसुकसंभवः पुत्रः मातापित्रनिमित्तकः।
तस्य दानविक्रयत्यागेषु मातापितरौ प्रभवतः।
नत्वेकं पुत्रं दद्यात् प्रतिगृह्णीयाद्वा। स हि संतानाय पूर्वेषाम्।
न स्त्री दद्यात् प्रतिगृह्णीयाद्वा। अन्यत्र अनुज्ञानात् भर्तुः॥

On this text Mr. Mandlik argues on the strength of the rule of interpretation above adverted to, that as it contains a reason, the precept is only recommendatory, and he proceeds to say that on the Analogy of Kubera and Nanda Pandita, who allow a Dwyamushyayana form of adoption of an only son by an uncle because the fear of the extinction of lineage does not in that case arise, we may say that an only son may be given in adoption by a father or mother who propose to attend to their own salvation, and that of their forefathers, by either begetting another son, or adopting a son, or by following one of the numerous ways before mentioned of satisfying the debts to their ancestors.'' And he cites some examples which happened to his knowledge. From the above passage it is clear that Mr. Mandlik either entirely misunderstood the case of Dwyamushyayana adoption allowed by Nanda Pandita, or is arguing on the assumption that the rule is only admonitory and tries to prove that even in that view the adoption of an only son does not go against the reason of the rule, as other arrangements might be made for the due perpetuation of the lineage and satisfaction of the debts to their ancestors. This may appear to be a plausible view, but on a closer examination it will be found that what Nanda Pandita allowed is not analogical to the case contended for by Mandlik. The case contemplated by Nanda Pandita is one in which in the very doing of the act you are not going against the reason of the rule, as by the peculiar form of adoption the boy continues the line of his real as well as his adoptive father, and Nanda Pandita could not be supposed to be so illogi-

cal as to say, " You may break the rule, provided you can subsequently make arrangements for perpetuating your lineage." It does not require much logic to see that as soon as the act is done, the rule is broken, and this breach is not remedied by any subsequent arrangements that might be made. In this view of the rule, it seems clear that Mandlik's construction is untenable, as also from the fact that he greatly depends upon the चेत् rule for this support, which, if it exists at all, as we have already shown, is not applicable to legal precepts and would work great mischief by converting many rules followed by reasons, which have hitherto been considered by our tribunals to be obligatory, into mere recommendatory rules, and thus making the way for everyone breaking with impunity rules which are absolutely obligatory or prohibitory. The next contention that has been put forward by Golap Chunder, and only referred to by Mandlik, is that based upon the absolute property of the parent in the child to the extent of sale, gift, or deserting. It has been said that in the earliest stages of human society, of which the patriarchal stage was one, although not the very earliest, the power of the parent over the child was absolute. The patriarch was the owner not only of what he tilled, and what he got by his labour, but was the absolute and practically unlimited owner of his wife, his children, and whatever had been acquired by them, by their own labour. In such a state of society it is quite possible that the father's power could in certain cases of necessity have extended even to the extent of selling away, giving away, or even deserting his own child, but all evidence as regards India points to the fact that such a state of society ceased to exist even at the very early and remote period when Manu's Book was written, which roughly has been placed by eminent Sanskrit scholars a few centuries before Christ. In the Manu Smruti itself we have abundant and clear evidence of the joint family having become the normal condition in society, and of the growth of the rights of the various members of the family as regards the ancestral wealth and any property acquired by their own independent exertions without the help of the paternal horde. The text of Manu defining the adopted son shows that a son cannot be given *except in distress.* This strongly points to the conclusion that even in the time of Manu the father's capacity to give away a son could only be justified by the exceptional circumstances of distress, thus negativing the absolute and unfettered right of the parent over the child. It is therefore clear that although there are to be found in Manu, Vasishta, Baudhayana, and a host of other Smruti writers, verses evidencing the existence of the patriarchal stage, yet in view of the fact of their having mentioned the joint family as the normal

unit of society, and in view of the fact of their dealing with the rights of the members *inter se* in a way which nearly places the father, as well as the sons, on equal footing as regards ownership of property and freedom of action, as well as from many other points of internal evidence, it must be said that the texts which relate to the power of the father over his children and wife, or any other texts which point to the existence of the patriarchal stage, are only copied by the Smruti writers in veneration for their more learned ancestors who had gone before, and who spoke about such matters from their own experience. Such instances of copying rules are very common, and are to be found not only in the branch of adoption, but also in every other branch, such as marriage and sonship; such being the case, it cannot be inferred from the fact of Vasishta saying so, that he still considers that a father had, in his own time, absolute property over his children. Such a view would strongly militate against the vested rights of sons in ancestral property, and also their capacity to acquire and own property separately. That being so, the proper construction of the stanza of Vasishta is not that the father had, and still has absolute property in his child, for such is not surely the case now, but that the origin of those peculiar rights that the father has over his sons and their property can be explained only on the supposition that the father had originally, in ages long gone by, power of absolute disposition over his sons, which gradually dwindled into its present dimensions. On principle the act of giving away by the father is based by Vasistha upon such a right in the father, as nobody that does not own property can give it away to another. Hence he says what the rights of the father and mother are over the child as they are found in his own time, and bases the existence of such power upon an original right of absolute ownership, which dwindled to the extent which he had described. It would be, therefore, inconsistent with sound principles of interpretation to construe the lines as first giving the father absolute power of disposal over his child and then limiting these powers by the subsequent clauses. For could it be said that at the time of Vasishta the father has absolute property in his children, so as to enable him to deal with them in the manner described in the text? Moreover, as has been said, proprietory right is a creature of the law, and comes into existence by an express text of law. If Vasishta or any other Smruti writer says the father has absolute property over his children, it must be construed so, but Vasishta does no such thing. He bases the power of giving on procreation, apparently a result of taxing his brains to find a reason. Again, another argument against the application of the doctrine *Factum Valet* to such a case based on the analogy of its applica-

tion by Jumitavahana to the case of an alienation of self-acquired immoveable property without the consent of his sons previously obtained is this. If it is once conceded that Factum Valet applies to this, all restrictions and rules imposed upon the adoption of a child by law should be null and void, for the argument applied by Sirkar to the above case, applies equally to all other cases, *viz.*, there is a text which gives the father absolute power, this text or that text only tries to restrain that power, and hence the adoption made is still valid as the fact of the power cannot be altered by a hundred texts. In this way we can get rid of almost all those restrictions on adoption which have developed gradually, which soften and render more equitable the dominant right of the father, and which, though much commented on and criticised by jurists as innovations by the Brahmin Pandits, for their own self-aggrandizement, are calculated to be very salutary by virtue of the fact that they restrain the father from using it arbitrarily, and diminish the number of adoptions on account of the numerousness of the conditions necessary to be satisfied before an adoption can legally and validly be made. It therefore seems to me that such a view of the law is clearly untenable, and calculated to upset all settled rules. Moreover the analogy drawn between a son and self-acquired property seems to be more far fetched and unreal, than that which can be drawn between him and property acquired at the expense of or with the aid of ancestral property, or with what their Lordships of the Privy Council compared it, namely family property, inasmuch as the progenitor himself has within his own veins running the blood not of one but of countless of his ancestors, and in such a view the restriction on alienation on the ground of necessity seems fair, and certainly desirable. Apart from all these, the theory of the learned Sastri proceeds upon what I would venture to call a total misapprehension of the theory of Factum Valet, as was the case with the more learned Bengal Lawgiver, Jimuta Vahana. For Sirkar tries to prove that the text is only recommendatory, and hence you can do the act, and in doing so, applies the doctrine of *Factum Valet*, which applies, as has been pointed out, only to rules of moral obligations and not to legal ones, and says that by applying the doctrine, the act can be done, and the rule is therefore recommendatory only and not legally binding. It is evident that there can be no clearer case of arguing in a circle, as the whole argument proceeds upon the presumption that the rule is recommendatory, which the learned Sastri had strictly to prove.

It may next be said that as the rule is followed by the rule of the woman giving and taking only with the permission of the husband, both the rules are of the same nature and are equally

recommendatory. It is clear that no such view can be maintained, as no Court has decided that a widow can give in adoption without the sort of the permission referred to therein. No doubt different interpretations have been put upon the time when the authority is to be given, either at a time of adoption, or before, but all the courts except the Madras High Court have been consistent in holding that in the absence of such authority as they construe the text to mean, the adoption is invalid. The Madras High Court base the validity of the adoption made with the assent of the Sapindas, though not with the husband's authority, on the ground of usage, and also on the principle that the assent may be taken to be sufficient evidence of the desirability of the adoption. Hence it is clear that no such argument can be maintained. In fact, as I have ventured to state, the true way of construing this text of Vasishta is to allow the capacity of the father to give in the case of all except the excepted ones on the ground of power which he had by begetting the child. Mr. Sarkar throws out a suggestion that the three sages lay down the rule while dealing with the religious side of the question, but far from being so, all the three sages are considering the question of gift and acceptance of a son in adoption, and the capacity to give, to take, and to be the subject of adoption, and these three are the essentials of a valid adoption from the civil point of view, as laid down by Mahmood J. in Ganga Sahai *v.* Lekraj Singh, and it should therefore be said that such rules are dealing with civil matters, rather than with religious. It is next important to consider the meaning and force of the words, "should not give or take." Mr. Sarkar Sastri says this is no more than the prohibition of the gift, and it does not carry the matter further than when the gift alone is prohibited, although Mr. Colebrooke seems to have thought it did. Now it is clear that in order that there may be a valid gift, both the act of giving and taking are necessary, and in the absence of one or the other of the two there is no legal gift. But the word gift has in addition to the narrower meaning, *viz.*, the physical act of giving, as separate from acceptance, also the wider meaning in law of a legal mode of transfer without consideration and completed. In this sense it may be said that the prohibition of the constituent elements of the legal act of gift means the prohibition of the whole, and hence the whole gift is invalid. At the commencement of this thesis we have referred to the absence of mention by Manu of this prohibition in the Manu Smruti. Before leaving the examination of the Smruti law on the subject, it seems to be necessary to refer to this, as the absence of any such prohibition has been construed by C. J. Edge and J. Knox, who delivered the leading judgments in the case, as

proving that Vasishta's prohibition was only recommendatory, and it was to some extent relied on by the Privy Council in support of this conclusion. Now Mr. Justice Knox in his learned judgment in Beni Pershad's case in 14 All., at pp. 119—121, has collected together all the texts bearing on adoption, and he says they are only very few. I owe it to him that the following are the only verses in the whole of the Manu Smruti that have any reference whatever to the subject of adoption. They are Chapter IX, 141-142, which say, "If the man who has an adopted son possessing all good qualities, that same shall take the inheritance, though brought from another family; an adopted son shall never take the family and estate of his natural father, the funeral cake follows the family and the estate, the funeral offerings of him who gives cease." Then comes verse 159, which mentions the adopted son as one of the six heirs and kinsmen; verse 168 defines an adopted son. These are the only texts that refer to adoption in the whole of Manu Smruti, and from the absence of any such prohibition Mr. Justice Knox, Edge, C. J., and others infer that there never was any such prohibition, and that it was created and brought into existence by Vasishta, who is mainly responsible for this, and that therefore it must be concluded that the rule has never been and is never to be considered as absolutely prohibitory. It is to be noted that although Mr. Justice Knox says they are very few, the question did not present itself to him why the texts were so few, and if such a question presented itself to him I dare say he would not have fallen into the error of drawing the conclusion that he did. Mr. Mayne has discussed this matter in a very able way, and if the learned Judge had his attention directed towards the question and Mr. Mayne's explanation, I believe he would not have fallen into this error. It is an undoubted fact that the law of adoption is a thing of gradual and constant growth from a very small and insignificant beginning, even perhaps in the Vedic ages. But it should not be assumed that the paucity of texts on adoption was due to the fact of the existence of a son not being considered a necessity. However much authorities differ as to the reason for the craving for posterity, still all are agreed that the existence of a son has been from even the primitive stage of society considered necessary and was anxiously sought for. Hence although adoption was not much in vogue, still on account of the existence of the other ten kinds of sons, excluding the Aurasa and the Dattaka, the craving was amply satisfied Moreover, that the above view is consistent with the philosophy of law is evident from the fact that in the Aurasa, Putrikaputra, Kshetraja, Gudhaja, etc., there is a closer resemblance in the Aurasa than in the case of the Dattaka, Krita, etc., as the strange-

ness of the relationship is not so transparent, while in the Dattaka and other cognate forms of sonship the fact of the strangeness of the relationship is evident and clear to all. Moreover, society must be somewhat advanced to admit of a fiction of law like the fiction of sonship.

And this fact is completely borne out by the paucity of texts relating to adoption in the early Smruti writers. We have enumerated above the slokas that are to be found in Manu, and they do not amount to more than four. These texts are only those which define an adopted son, and which fix his right of inheritance, and nothing more, and these amply prove that the subject was not in Manu's time of great importance, and that adoption was very rarely resorted to for the affiliation of a son for the perpetuation of lineage in view of the recognition of persons as sons, although they were not really sons. Hence it is clear that the restrictions imposed upon adoption were also very few, and it is a significant fact that as adoption became more and more common, the restrictions on it have also largely multiplied to counterbalance the numerousness of cases, probably due to the fact of natural instinct being to some extent disposed against recognising a stranger as a relation, especially a son, or a relation as the closest of all relations, the son. The only restrictions, if they are really such, contained in verse 168 are denoted by the three words आपदि, सदृश, प्रीतिसंयुक्तम्. If we begin from the last we can easily see that these were not restrictions of a peremptory type, but were simply qualifying words describing the characteristics or points that ought specially to be sought for in the case of adoptions. प्रीतिसंयुक्तम् (who is affectionately disposed) is, I have not the least doubt, only a qualifying phrase denoting that it is highly desirable that the son should be affectionately disposed, and the interpretation has never, so far as I have been able to ascertain, put upon it, that being affectionately disposed is a condition precedent for a valid adoption, and this is so as the giving is the act of the natural parent, and at a time when it is not easy to say whether the boy is affectionately disposed, or is disposed in any way at all towards the adoptive parents. Next let us consider the word सदृश which literally means similar; and which, although interpreted to mean of the same or equal in class, seems to me to connote a general similarity in disposition, habits, nearness of relationship, status in society, rather than in equality in caste specially and exclusively of the other similarities; and in this view it seems to be that Manu did not intend to say more than that the son should be similar to the father. Next let

us examine the word आपदि , which means, in distress; on this word Vijnaneswara says " आपद्ग्रहणादनापदिनदेयः । दातुरयं प्रतिषेधः" From the mentioning in distress, (he) should not be given in the absence of distress, the प्रतिषेध is to the giver. This obviously means that where there is no distress the son should not be given. Mr. Mandlik following Vyavahara Mayukha by a most strained interpretation says on this that this prohibition regards the giver and not the act. It is not easy to see how Vijnaneswara had the exclusion of the act in his mind at the time of writing his gloss. To my mind the true construction as consistent with the language and the grammatical construction of the word seems to be that Vijnaneswara asks himself the question, " There is the word आपदि whose आपत् is it, is the giver to be in distress or the taker ? And as the verse says " He should give in distress," the आपत्, *viz.* distress, is only that of the giver, and not that of the taker. Even in the case of this distress it is clear that it is not an absolute limitation, but it was only a limitation introduced by Manu saying that the son should be given on rare occasions only, as when the father is in distress ; no subsequent commentator has laid stress on this point, except the Mitakshara, and it is clear that it has never been considered as of legal obligation. Moreover distress, similarity, etc., are very wide and general terms, and are not specific enough to be known without the further enquiry, ' what is the nature of the distress which is meant, and what is its quality ? ' Nothing is said about it in Manu, and the only conclusion seems to be that by the use of the word he intended that the father can give away a son only in very rare and exceptional circumstances. No other restriction is to be found in Manu, and still the courts have never drawn any inference from such silence of Manu, as regards the restrictions not found therein, but later imposed, that such prohibitions not having been mentioned by Manu were only recommendatory. If that were not so, all the latter restrictions, which are of legal obligation, will be construed to be monitory only by the silence of Manu. Hence the true view seems to be that Manu's silence is quite natural, as all these restrictions are latter-day developments, and Manu could not predict what developments the law of adoption would take in future. On the other hand it may with great reason be urged, that the silence of Manu is accountable by the fact that the subject of adoption being very rare and insignificant, the adoption of an only son was, a fact never in the contemplation of Manu as likely to take place, and for that reason he might not have thought it necessary to mention any such prohibition at

all. Before finishing this branch of the subject it is necessary to refer to an argument of Mr. Justice Knox at p. 121, I.L.R., 14 All., wherein adverting to two verses 137 and 138 of the 9th Adhyaya, which speak of the son's importance in giving immortality to the father and delivering him from hell, and saying that some commentators infer that Manu did know of the essential qualification that a son must not be an only son, Knox, J., remarks that it will ever be a mystery to him why Manu should have left it as an inference. But the mystery would have been cleared up, and it would have been as broad daylight, if only the view above referred to of the insignificance of adoption itself in early ages, and of the gradual development were borne in mind ; and this rarity of adoption, together with the necessity of a son, both temporal and spiritual, would strongly have pointed to the conclusion that Manu considered the giving of a son itself to be extremely rare, and much less did he think that an only son would ever be given away, and hence he left it as an inference from cognate restrictions, rather than a direct prohibition in express terms which seems to have become necessary by the time of Vasishta, when adoption was more developed than in the time of Manu. Next we come to the text of the Mitakshra, which however is not, as those that have gone before, are, a Smruti, but only a commentary by a learned man of the Smruti of Yajnavalkya. But it has always been considered as one of supreme authority over all Hindus except those governed by the Dayabhaga school, as correctly interpreting the law contained in the Smrutis.

Verses 9 to 11, Chapter I of Mitakshara run thus :—

मात्राभर्त्रनुज्ञया प्रोषिते प्रेते वा भर्तरि तत्पित्रोर्वा उ भाभ्यां वा सवर्णाय यस्मै दीयते स तस्य दत्तकः पुत्रः। यथाह मनुः "मातापितृ वा दद्यातामयमदिभः पुत्रमापदि। सदृशं प्रीतिसंयुक्तम् स ज्ञेयो दत्रिमः सुतः॥" इति॥ आपद्ग्रहणादनापदि न देयः। दातुरयं प्रतिषेधः।

तथा एकः पुत्रो न देयः न ह्येकं पुत्रं दद्यात् प्रतिगृह्णीयाद्वा इति वसिष्ठस्मरणात्।

तथा अनेक पुत्र सद्भावेऽपि ज्येष्ठो न देयः। ज्येष्ठेन जातमात्रेण पुत्री भवति मानवः इति तस्यैव पुत्र कार्यकरणे मुख्यत्वात्॥

"He who is given by his mother with her husband's consent while her husband is absent or after her husband's decease, or

who is given by his father or both, being of the same class with the person to whom he is given, becomes his given son. So Manu declares.'' By distress it is intimated that the son is ought not to be given unless there be distress. This prohibition regards the giver. Similarly an only son is ought not to be given, for there is the Smruti of Vasishta to the effect that '' But he should not take or accept an only son.'' '' Similarly even though there are many sons, the eldest should not be given, for a man becomes a father by the birth of the eldest son, from the chiefness of his in doing the duties of a son.''

It is almost undoubted now that the translation of Mr. Colebrooke of the prohibition regarding an only son into 'must not' is unwarranted by the language of the original text, although it might perhaps be defended on the ground put forward by C. J. Sargent in 14 Bom., 249, that Colebrooke understood the passage as implying an absolute prohibition; yet we cannot say with Sargent, C. J., that Westropp, C. J., knew the state of the original text, and even supposing he did, it would be as pointed out by the Privy Council following Colebrooke as of supreme authority instead of discussing the text of the Mitakshara, wherein he could have referred to the view of Colebrooke as embodied in his translation.

It must be conceded that these three prohibitions, as expressed by Vijnaneswara, are couched in almost the same terms and are connected with each other by the word तथा, meaning 'similarly.' But although there is this common feature, it is submitted that much stronger reasons than these should be shown for construing all these texts as of the same legal efficacy. In the first place it is to be noted that an express prohibition, whatever may be the nature of it, is inculcated only as regards the second of these, *viz.*, that about the adoption of an only son, while the other two, adoption except in a case of distress, and adoption of an eldest son, are only the inferences of the author from certain statements of Smruti writers, and it can therefore be asserted that while the prohibition of the adoption except in case of distress, and of the eldest son, are matters upon which the author has expressed a clear opinion, and especially when the Smruti writers do not expressly, or by necessary inference, say so, the two prohibitions seem to rest entirely on the authority of the commentator himself, and he is mainly responsible for the view, while in the case of the second, that of an only son, the author does do no more than quote the text of Vasishta and give its purport in his own words, which are an exact paraphrase of those of Vasishta.

This difference of treatment is very material, as although the three prohibitions are similarly expressed, still in view of Vijnaneswara quoting the text of Vasishta, and giving its paraphrase, it is to be understood that as regards this prohibition at any rate he refers us back, to use the language of Edge, C. J., to the original Smruti text itself, whose meaning determines the binding nature of the prohibition. Of course it cannot be denied that Vijaneswara himself by saying that (he) should not be given except in distress, similarly an only son should not be given, similarly the eldest should not be given, seems to imply that in his view all the three should not be given, and in this respect the three prohibitions are similar. But my submission on this matter is that though they are so expressed, still these statements leave the matter entirely in the dark, whether the prohibition is only based upon religious considerations, and is simply admonitory, or whether all or any of them are legal and binding obligations: and although we cannot decide as to the giving except in distress, and the giving of the eldest son, at least as regards that of an only son we are referred to the text of Vasishta, whose view is to guide us in arriving at a conclusion. Again the nature of the other two prohibitions seems to indicate that they are not *ex nature rei* obligatory. By saying distress, it is a question what sort of distress is meant and what is the quality or magnitude of it, and in view of the vagueness of the prohibition it seems to be incapable of enforcement. This view gains strength from the fact that in none of the subsequent texts is this insisted upon as a condition precedent for the validity of the adoption, and it seems natural to imagine that it is only a recommendatory precept based on purely obvious and worldly reasons. Now the adoption of the eldest son stands on a different basis altogether, and is entirely free from the vice of indefiniteness above pointed. But in this case, if we for a moment consider the reason assigned to the prohibition, we can easily see that it comes to this, namely, that no doubt all the sons are able to save their ancestors from hell, and to do the needful religious ceremonies, and thus perpetuate the lineage of their ancestors; but in view of the eldest amongst these being the chief and most important of all in doing the duties of a son to his ancestors, he should not be given away. Hence supposing the eldest son is given away, it undoubtedly comes within Saunaka's second clause, "by a man having many sons should the gift of a son be made with every effort," which is wide enough to include the eldest son also; and although the chief son in doing the duties to ancestors disappears from the scene, all the other sons are capable of doing these duties. It should also be noted that the text regarding the merits of an eldest son

does not say that there is any difference in the religious merit between the case of an eldest and of other sons, but that the eldest son is the chief person in doing the duties of a son, referring to the well-known and universal practice of the eldest son performing the usual ceremonies, while the other sons stand by him. This is also evident from the fact that when brothers separate themselves, not only does the eldest perform all the ceremonies, both annual and periodical, but all the other sons severally perform the same. Hence from these facts it seems clear that there is nowhere in the whole field of Smruti law an express prohibition referring to an eldest son, and that although such a son may be given away, there is not the least reason for the obsequies of the father failing, or for the accrual of any religious or temporal loss. From this it is clear that prohibitions 1 and 3 are from their very nature recommendatory only, and no such reason applying to the case of an only son, it cannot be attributed to Vijnaneswara that all these are to be considered as of equal force and binding nature.

Here it seems necessary to refer to the translation of Vijnaneswara's commentary by Colebrooke, who is justly famous as one of the greatest Sanskrit scholars, and of whom Mr. Mayne says "he was not only the greatest Sanskrit scholar, but the greatest Sanskrit lawyer whom England has ever produced." Colebrooke, while translating the text about the prohibition as regards gift except in distress, uses 'should not,' while in the case of that of an only son he uses 'must not,' and of that of an eldest son he uses 'should not' again. No doubt the judgments of Mitter, J., and especially of Westropp, C. J., proceeded upon a consideration that the words 'must not,' as opposed to 'should not' in the other two cases, were to be so found distinctly in the original work itself. But on a comparison of the original text itself with the translation, it being found that the words are the same नदेय: the conclusion was at once drawn that Colebrooke was in error. I do not think that anybody would contend that Colebrooke was ignorant of the distinction between 'must not' and 'should not,' nor could it be said that for the sake of elegance he translated the same phrase in different ways, as in every translation which aims at being literal and correct, elegance is to be sacrificed for the sake of other considerations, nor could it be said that it was a mere slip, for if so there is no reason why the 'must not' should go with the case of an only son while that of distress and eldest son are referred to as 'should not'; nor can it be said that Colebrooke was ignorant that नदेय: was the phrase used in almost all these three cases, for there appears to be no other reading of the text. Hence we cannot but infer that the variation was advisedly introduced by Colebrooke to charac-

terize the distinction between the three precepts, the prohibitions regarding an only son contained in Vijnaneswara being construed by him to be of a binding nature legally, while the other two are not. No doubt it is unfortunate that Colebrooke should have incorporated such a view in the original translation itself, but the conclusion cannot be resisted that Colebrooke construed the text in the manner indicated above. We will refer hereafter to his independent and express opinion on the matter, but it is sufficient here to say that it is in accordance with the above view. Narada, who is considered by Dr. Jolly to have flourished about the 11th century A.D., and consequently about the same time as Vijnaneswara Yogi, will be referred to later on while discussing invalid gifts. We next come to the modern writers, or writers of the third period, according to Knox, J. Surely at the head of these stands the Dattaka Mimamsa of Nanda Pandita, a writer of the Benares Branch of the Mitakshara school, who is undoubtedly treated as an authority in matters of adoptoin in all parts of India, while the weight to be given when in conflict with certain other local treatises varies slightly in the various schools. See 12 M.I.A. 437 (Ramnad case) Rungama *v.* Atchama, 4 M.I.A. 97, 9 All., 322. West and Biihler, p. 864, 14 Bom., 259. 21 All., 461.

His text runs thus :—

इदानीं कीदृशः पुत्रोकार्य इत्यत आह शौनकः नैकपुत्रेण कर्तव्यं पुत्रदानं कदाचन । बहुपुत्रेण कर्तव्यं पुत्रदानं प्रयत्नतः ॥ एक एव पुत्रो यस्येति एकपुत्रः तेन तत्पुत्रदानं न कार्यं । नत्वेवैकं पुत्रं दद्यात् प्रतिगृह्णीयाद्वा इति वसिष्ठस्मरणात् । अत्र स्व स्वत्वनिवृत्तिपूर्वकपरस्वत्वापादानस्य दानपदार्थत्वात् परस्वत्वापादानस्य च परप्रतिग्रहं विन अनुपपत्तेः तमप्याक्षिपति । तेन प्रतिग्रहनिषेधोऽपि अनेनैव सिध्यते । अत एव वशिष्ठः नत्वेकं पुत्रं दद्यात् प्रतिगृह्णीयाद्वा । तत्र हेतुमाह "स हि संतानाय पूर्वेषां । संतानार्थत्वाभिधानेनैकस्य दाने संतानविच्छित्ति प्रत्यवायो बोधितः । स च दाहप्रतिग्रहीतेरुभयोरपि उभयप्रेयत्वात् ।

यत्तु स्मृत्यंतरम् "सुतस्यापि च दाराणां वशित्वमनुशासने । विक्रये चैव दाने च वसित्वं न सुते पितुः ॥ यच्च योगीश्वरस्मरणं । देयं दारा सुतादृत" इति । तदेकपुत्रविषयं ।

'कदाचन' आपदि, तथा च नारदः

निक्षेपः पुत्रदारं च सर्वस्वं चान्वये सति ।

आपत्स्वपि हि कष्टासु वर्तमानेन देहिना ॥

अदेयाद्याङ्गराचार्यायद्यत्साधारणम् धनं इति इदमप्येक पुत्र-विषयमेव वशिष्ठगौनकैकवाक्यस्मरणात् ॥

This passage from Nanda Pandita is clear on the question and says that such a gift is absolutely prohibited. He depends upon Saunaka, Vasishta and Narada. We have discussed the views of Saunaka and Vasishta, and they are against the validity. We will find that Narada's text is of the same effect. That the conclusion of Nanda Pandita is that such a gift is invalid is placed beyond doubt by the line of argument he has taken. He says in order to create a transfer of property, there should be gift and acceptance, and without the latter there is no valid transfer, and there he says the text of Saunaka implies all this, that the gift as well as the acceptance is prohibited, and hence no property will pass. A further and stronger reason he gives from the fact that Narada and another Smruti writer totally deny the existence of any proprietary right of the father in his only son, so as to enable the father to give away his only son. Hence his conclusion is that no such gift can be made. He also construes Vasishta's text to mean that both gift and acceptance are not allowed, and the same result follows. Mr. Justice Knox, in criticising this passage, refers to the first part of Saunaka's text, and is compelled to admit that it is very emphatic, but he is apparently carried away by the argument of Mr. Mandlik, which we have already pointed out is defective in more ways than one. It has also been suggested that there is internal evidence in the Dattaka Mimamsa itself to show that Nanda Pandita himself did not consider the adoption to be absolutely void, and the non-user of the particle वै, and a certain obscurity and want of crispness in the line of reasoning is also referred to; but it is clear that such general remarks will be of no weight whatever when considered along with the line of argument above adverted to as being contained in the passage of Nanda Pandita. The only contention that therefore remains to be noticed, is that while in Section III, in the case of adoption of a boy different in caste, the answer of Nanda Pandita is that such an adoption is not invalid, but that such a son is entitled to food and raiment, and Section V refers to a case when the ceremonies fail and the result is stated to be that the filial relation even fails, in Section IV no such result is stated.

We have shown above the reasoning on which the view of D.M. is based, and we have shown the result he had arrived at, and if it still be asked why he does not expressly say so, all that can be said is he has shown that result by clear and unequivocal texts, and otherwise the necessity for quoting those texts will be absolutely nothing. Again Mr. Golap Chunder Sirkar says that "if the adoption of an only son were not valid in law, but *ab initio* void, there could be no real gift and acceptance, and no sin could be incurred by the so-called giver and acceptor who were parties only to the mechanical act of giving and taking. When you say that a man commits sin by the gift or acceptance of a thing, you use these words in the ordinary sense of extinguishing or creating a right to the thing; and if such right is not effected in any way there is neither gift nor acceptance, how then can sin be committed by the persons concerned in the sham transaction? Hence from Nanda Pandita's argument you cannot but draw the conclusion that the adoption of an only son must be valid in law." This argument is entirely based upon a mistaken hypothesis. The argument really is this :—If you say that such a gift is valid in law, still as the offence of extinction of lineage is incurred, there is sin attaching to the giver as well as the taker. Hence by prohibiting such a gift altogether such a sin is prevented from accruing, and hence the gift and acceptance is prohibited. This is clear and requires no explanation, but Mr. Sirkar Sastri's ingenuity leads him to argue that there can be only sin if there is real gift and acceptance, and hence such a gift is valid, although sin attaches to it. The unsustainability of the argument is apparent on the face of it. In this connection, it is also necessary to refer to a certain passage in the D.M. referred to in an earlier part of this paper, that the rule of Vasishta does not apply to the case of adoption of a brother's only son, as the offence of extinction of lineage does not there appear, and we have given our conclusions thereon before, and they fully go to support the theory of Nanda Pandita of the invalidity of such an adoption.

We next come to the Dattaka Chandrika, whose authority on matters of adoption is only second to that of the Mimamsa, although a doubt has been thrown on the authorship of the Chandrika. It premises that a brother's son must be preferred to others, and answers the objection when such brother's son is his only son by saying that such an adoption constituting the Dwyamushyayana form, does not come under the text of Vasishta and is therefore valid. The remarks made above on a similar view of Mimamsa apply here, and prove that the author of the Chandrika too considers the rule as binding. Otherwise he need not have tried to distinguish the case from that contained

in Vasishta's rule. The next treatise, the Dattaka Niraya, is the first that clearly upholds the validity of such an adoption, although sinful from a religious point of view, and thus strikes the first note of discord in an unbroken and hitherto uniform current of opinion. It says, "Next the law relating to the gift and acceptance of a son is considered. On this Vasishta says, 'In this text, the prohibition of the gift of an only son is mentioned for the purpose of showing that sin is incurred by so doing, and not for the purpose of showing that the gift is invalid.' Similarly also the gift of the first-born son is also prohibited, for Manu says."

This work has never up till now been treated of as an authority, and it is not possible to say what amount of authority is due to his statement, for in coming to the above conclusion as regards the interpretation of Vasishta's text, he nowhere adduces any argument which either by its accord with natural logic, or consistency with jurisprudence, should convince us; and there is nothing whatever to compel us to accept the *ipse dixit* of the author. No doubt it is in favour of validating the adoption, but no weight can be attached to it, as he adduces no arguments to support his conclusion, and as he is not an accepted authority. We next come to Jagannatha's digest, compiled by Jagannadha Tarka Panchanana at the instance of Colebrooke about the end of the eighteenth century. He clearly says that such a gift when made is valid, although there may be sin attaching to such gift and acceptance. Now as regards the authority of Jagannatha conflicting views are held. Mr. Mayne says, "Colebrooke himself early hinted a disapproval of Jagannatha's labours as abounding with frivolous disquisitions, and as discussing together the discordant opinions maintained by the lawyers of the several schools, without distinguishing which of them is the received doctrine of each school, or whether any of them actually prevail at present." On the other hand Mr. Justice Mitter pronounced a high eulogium upon Jagannatha and says, "I venture to affirm that with the exception of the three leading writers of the Bengal school, Dayabhaga, Dayathatva, Daya Kramasangraha, the authority of Jagannatha is, so far as that school is concerned, higher than that of any other writer on Hindu Law, living or dead, not even excluding Mr. Colebrooke himself. His own opinion, whenever it can be ascertained, may generally be relied on as representing the orthodox view of the Bengal school." It seems extremely singular that Jagannatha, who is considered by Mr. Justice Mitter to be such a high authority, and by Mr. Mayne to represent generally the views of the orthodox party of Bengal, should come to such a conclusion on a question which, it must be admitted,

to a large extent depends upon religious benefits, especially when the course of decisions, as will be presently shown, was consistent with the orthodox view of the matter. The Sarasvati Vilas, the Smruti Chandrika, the Viramitrodaya and other works simply quote Vasishta's prohibition without expressing any independent opinion, and therefore they are not discussed here. J. *vide* Sarasvati Vilas 368-369. Viramitrodaya ii, 8. Mr. Sirkar in connection with this says that this accords best with reason, for, he argues, if such an adoption he pronounced invalid in law, the decision must be based upon the principle that a man is legally bound to have a son, hence such a gift is not permitted by law, and that consistently with this you must go the length of compelling each sonless person to provide himself with sons, and this result is obviously absurd. Now this argument would be valid if the original invalidity of the adoption is based upon the principle that every person is legally bound to have a son. But that is not the principle on which the invalidity of the adoption is based. The invalidity is based upon the parent's incapacity or want of power in giving away an only son, on whom not only he, but also his ancestors have claims for the performance of the periodical and annual ceremonies, and for the perpetuation of their lineage, and celebrity of their name. Hence the want of absolute power of disposal being the basis of the invalidity of such an adoption, the rest of Sirkar's reasoning built on the assumption of the application of this principle, and this principle alone, falls to the ground. There are other arguments of Mr. Sarkar which seem to be very trivial and not deserving of much weight, such as giving away is best for a poor man with an only son, that religious ceremonies are not performed through poverty, or through want of religious enthusiasm, and the only answer that should be given to these, is that law is made in the view that every Hindu behaves as a Hindu ought to, and in consistency with the notions of Hindu society and its practices ; the law should be promulgated on the assumption that people generally follow the teachings of Hindu Religion and law, and law is made to meet the requirements of society presumed to be in accordance with Shastras only. As regards the poor man giving away his only son, rather than allowing him to starve, the case imagined by the Pandit is rather extraordinary, and I doubt whether such a case ever finds existence in reality except in the mind of the Pandit. I rather thought that it is, if any, a craving for greater wealth that tempts parents to part with their sons, and even then, from my knowledge, and from the experience of aged men in this Presidency, giving away in adoption is not so often resorted to with purely motives of temporal

aggrandizement, although they form some of the motives which make people give away their sons.

We had occasion to refer to the Smruti Chandrika and Viramitrodaya and other works as quoting Vasishta's prohibition, and we deferred the consideration of texts on invalid gifts till now. Mr. J. C. Ghose has brought to light the inestimable fact that whenever a son was declared अदेय, it referred to an only son in the view of the commentators, and that अदेय was included in अदत्त, and was not only meant to signify gifts which are merely immoral, as offending against religious notions, but were also invalid, in the sense that no such gift can be recognised by law. To use the language of Mr. Ghose, "There is no room for speculating upon the meaning of अदेय." Now Smruti Chandrika, while treating of the gift of an only son and saying that it is अदेय, refers us to the discussion in the chapter on gifts. On turning to the chapter on gifts we find that the author lays down that अदत्त includes and means अदेय with reference to the following verse of Narada :—

निक्षेपः पुत्रदानं च सर्वस्वंचान्वये सति ।
आपत्स्वपि हि कष्टासुवर्त्तमानेन देहिना ।
अदेयान्याऽऽचार्यायद्यत्साधारणं धनम् ॥

It is to be noted that Nanda Pandita, too, when he quotes this verse, says this prohibition of the gift of a son relates to an only son, and it is not the single opinion of Nanda Pandita as was supposed by Mr. Justice Knox in the 14 All. case, but the Smruti Chandrika, as well as the Viramitrodaya, distinctly say that such a prohibition refers to an only son. Apastambha, who is undoubtedly a very ancient Smruti writer, prohibits the gift of a son and a wife in similar terms, and it is to be inferred that that prohibition refers also to the case of an only son. Nanda Pandita, it should be noticed, quotes another Smruti, whose name he does not mention, that the father has only power over his sons and wives, in ordering them, and that he has no such power over the son in the matter of gift or sale of him. This text distinctly denies the capacity of the father, as well as his absolute ownership, to dispose of a son in any manner he likes, and it follows that in the face of a distinct prohibition the gift of an only son is absolutely invalid. He also quotes the Yogeswara as saying, "except the son and the wife, anything may be given (Deya), thereby meaning a son is Adeya, which is also interpreted by Nanda Pandita to mean an only son. As shown above the Smruti Chandrika distinctly says that in Nanda, Adeya is also

included in Adatta, and further proceeds to lay down a rule which applies to the other Smruti texts quoted above, *viz.*,

गृहीतस्य परावर्तनमपि महोक्तिता कार्यं अदत्ता देय ग्रहणाद्-ग्रस्यते । अदत्तेन च अदेयेन च दान सिध्याभावात् परस्वत्वानुत्पत्तेः ॥

which can be paraphrased into—"the thing given, should be taken back, because both in the case of Adatta and Adeya, the legal effect of gift does not take place, there being no accrual of another man's ownership." The Viramitrodaya nearly repeats the same thing over, and it seems conclusively to follow that even though a thing is said to be Adeya, it cannot legally and validly be made the subject of a gift, and an only son being Adeya, as is seen from the language of the Smruti writers noticed above, must come within the above ruling, and must hence be incapable of being the subject of a gift.

Mr. Ghose, in addition to the above, also points out that the Mayukha also says there is no Vyavahara Siddhi in the case of an Adeya, and says there is further Prayaschitta to be performed. It is undoubted, therefore, that he too contemplates the non-siddhi of Vyavahara in the case of the adoption of an only son. The Vivada Chintamani, a Mithila authority, is also quoted as saying that the gift of a wife and son without their consent are void, and as further laying down that an only son cannot be given even when he consents. Hence from these authorities on invalid gifts the conclusion is irresistible that the gift of an only son is an invalid gift, even from a legal point of view, apart from the irreligiosity of the act, and the sin attaching to both the giver and the taker. The above passages, I think, sufficiently refute the argument of those who contend that nowhere has it been said that such a gift is invalid, and that consequently the gift is legally valid although it may be immoral. The above passages show clearly that no property passes in such cases, there is no accrual of the ownership of another person, and that there is no Vyavahara Siddhi in the case of such gifts. No doubt these statements are made generally as regards Adeya, but it cannot be denied that a son and a wife, son being construed to mean an only son, perhaps, by its use in the singular, and by the authority of Vasishta, are Adeya, and *a fortiori* from the express prohibition in Vasishta as regards an only son, he is also an Adeya, and consequently incapable of being legally and validly given away.

Before finally leaving this part of the subject, it seems to me that it is necessary to state that I felt not a little diffidence and fear when I found that my views were entirely different from

those of Mandlik and Sirkar, who had great reputation as Sanskrit scholars, and whose views found acceptance at the hands even of their Lordships of the Privy Council. I was a little emboldened when I studied Mr. Ghose's paragraphs on the subject throwing light on the matter, and finally very much by a certain criticism on the work of Mandlik made by that distinguished Sanskrit scholar and laywer, K. T. Telang, J., whose early death must always be greatly deplored by every one interested in the study of Sanskrit and of law, and published in the 11th volume of the *Indian Antiquary*, a journal of Oriental Research published at Bombay under the editorship of Dr. J. Burgess. It begins at page 51 under the head of book notice, after discussing the defects that Mr. Telang finds in the translation of the Mayukha, which include misinterpretations, which are not a few, he says, "The defects I have shown, and they are only a few out of those I have observed, will, I think, bear out the assertion that this translation falls very far short indeed of just expectations. They seem to fall into four classes. We have words inserted in the translation which are not always in the original, and which are not always necessary for understanding it, and which, too, are not always denoted as translator's additions. We have words in the original which are not represented at all in the translation. We have renderings which involve quite unnecessary deviations from the original. And lastly, we have renderings which are based on positive misconceptions of the text."

Mr. Telang next goes on to criticise the views of Mandlik as expressed in his Introduction and the Appendices. He says: "The propositions on the law of adoption, and marriage, and the Sapinda relationship, so laboriously discussed in these appendices, are now too well established to be upset. The last has been settled by a decision of the Privy Council, that about the adoption of an only son has been settled by a decision of a Full Bench of the High Court of Bombay; and the principle of decision regarding marriage customs has been laid down probably by too many Judges of the High Court to be now upset by any Bench whatever. The point touching the Sapinda relationship, and the adoption of an only son, are both difficult ones. I cannot say, however, that Mr. Mandlik's discussion of the grounds on which the position he assails are based is satisfactory." I wish, before closing this quotation, to refer to two very important points on which Mr. Telang criticises Mandlik. The first is as regards the view of Purva Mimamsa about the gift of a son in the Visvajit sacrifice. Mr. Mandlik makes Jaimini say that such a gift should be made. Mr. Telang's conclusion on the point is that the view of the Purva Mimamsa is that the father has no property in his child, and that Nilkanta thinks so too, and

that a man cannot give his sons in a Visvajit sacrifice, because he has no property over them. This error is very material for our purpose, as it led him to construe Vasishta's text as giving the parent absolute property over his children, which, as shown above, is not the case.

Lower down he notices two or three mistakes in translating the portion about the subject of adoption. These will amply show that the statements of Mandlik are not so absolutely correct or authoritative as to be above being subjected to critical examination.

We do not separately examine the views of English lawyers here, as their opinions are quoted in all the cases and depended on as authoritative for the positions taken. Hence we will at once enter into an examination of the case law bearing on the subject. The earliest case that arose in Madras was that of Vīraperumal Pillai *v.* Narayana Pillai, which seems to have come before Sir Thomas Strange as Recorder of Madras in 1801. But the objection does not seem to have been really valid, as the boy was the only son of the younger wife, there being another son by the elder wife living at the time of the giving. Sir Thomas Strange quotes the text of Vasishta and the opinion of Jagannadha thereon, that such an adoption if made would be valid, and says, "The opinion of the present Pandits of Bengal is 'that a person who has only one son should not give him away; nor should he give away an elder son; the adoption of an only son is indeed valid, but both giver and receiver are blameable.' This appears to have been settled in the instance of the Raja of Tanjore. In that important case the person adopted was the only son of his parents; and it is a mistake if any one imagines that the deviation from the rule on the occasion was supported upon any ground of Mahratta custom or policy. The objection appears to have undergone deep consideration, conducted in part through the fortunate medium of Sir W. Jones, and certainly in a way to evince the anxiety of Government to be rightly advised. It appears that the Pandits of Bengal and Benares in general were of opinion that 'in all countries the affiliation of an only son is valid, although the parents who give and the adopter both incur sin, by deviating from the ordinances of the Shaster, which declare the giving or taking of an only son to be improper.' Ramavana indeed, and the other Pandits who sign with him, state that an only son could not be given in adoption to the Raja. But it appears that they rather mean that the act could not be done consistently with the Shasters, than that the adoption was invalid, for they expressly state that 'several usages had been adopted and followed, that are not found in the Shasters, and are to be looked upon as valid.'" This exposition was considered

at the time as reconciling their opinion with that of Kasheenath and the other Benares Pandits, who stated "that the adoption of an only son is one of those acts which is tolerated by usage, although it incurs guilt according to the Shasters." In the first place the above statement of the law was not necessary for the decision of the case, and must be taken to be merely an *obiter dictum*. In the second place, the decision proceeds upon the view of Jagannath, which certainly is not an authority in Madras, and Jagannath's view of Vasishta's text is accepted as correct. In the next place, the opinion of the then Pandits of Bengal, together with the conclusion of the Government, as the Raja of Tanjore's adoption seems to have influenced him. As against that opinion of the Bengal Pandits, it will be shown that there were subsequent opinions which declared such adoptions invalid, and the Raja of Tanjore's case is not a judicial decision, but only a private opinion taken, and as such has not the strength of a judicial decision. Moreover, the opinion of the Pandits therein given seems to go upon the existence of such a usage, at the same time saying that such an adoption is not valid according to the texts. It is not known whether there was any long and consistent usage proved before the Pandits, but even if it were so, their conclusion will not be based upon a view of the law, but upon express and clear usage to the contrary. Hence it seems to me that the authorities on which Sir Thomas Strange bases his decisions are not authorities which support him. Coming next to a case in 1817 between Arunachelam and Iyasamy, where the question was whether a person was bound to adopt even the only son of an elder brother, the Pandits seem to have stated that such a gift or acceptance is not lawful, and that therefore a man is not bound to adopt such a boy. But they stated, "If such an adoption in fact took place, although the giver and receiver committed sin, the adoption is valid." It seems to be extremely strange how such a gift can be validly made if it is unlawful to give or receive him. Moreover they overlooked the distinction that such a rule does not apply to the case of a brother's son. Next we have the case of Perumal Naicker and Pottee Ammal, decided in 1851, in which the Pandits in giving an opinion upon the adoption of the eldest son of a brother, refer to their own opinion given in 1848, declaring the adoption of an eldest son invalid, but distinguish the present as the case of a brother's son, and the Court expresly bases the validity of the adoption upon this ground. From this we are entitled to infer that they thought the adoption would be otherwise invalid. In 1854 the case of Chocummal and Surathy arose, being the case of the adoption of an eldest son, which the Pandits again pronounced to be invalid, but the decision was upset on

other grounds of acquiesence and lapse of time. After the Madras High Court was constituted in 1862, the case came on for direct decision before Scotland C.J. and Frere J., in which the judgment was delivered by the Chief Justice, and concurred in by Frere J. The Chief Justice refused to take the opinion of the Pandits and held by decided cases to *viz.*, Veeraperummal case, Tanjore case, and Arunachalam Pillai's case, with two Calcutta decisions, Nundram *v.* Kashee Pandy and Sremutty Joymonee Dosee *v.* Sibsoondaree, and depending upon the opinion of Sir Thomas Strange that " with regard to both these prohibitions respecting an only and an eldest son, where they most strictly apply, they are directory only ; and an adoption of either, however blameable in the giver, would, nevertheless, to every legal purpose, be good ; according to the maxim Factum Valet held such an adoption to be valid. He considered the contrary opinion of Mr. Justice Strange and disposes it of by saying that it cannot be said that the adoption fails in its essential use. Mr. Branson, who appeared for the appellant, seems to have relied only upon the passage from Strange's Manual in which he comes to the conclusion that the prohibition is absolute and such an adoption void. None of the other texts of Vasishta, Saunaka or Baudhayana ever seem to have been brought to their Lordships' notice, nor apparently the texts of Vijnaneswara, Nanda Pandita and others, nor the discussions on gifts in Smruti Chandrika. It seems to me that the conclusion seems to be based on insufficient material, and on decided cases which themselves did not decide expressly and on proper authorities about the validity or otherwise of such an adoption. In fact, the case of Nanda Ram *v.* Kashee Pandee clearly and expressly decides the other way, holding such an adoption invalid. Mr. Whitely Stokes, who appears to have been the reporter, adds a note to the case which says, " The Hindu Law, as laid down in the case now reported, varies remarkably from the Roman rule that the last of his gens could not enter a new family, lest the sacra of the gens should be lost." This is a very remarkable point, and I think, if the theory propounded be correct, that ancestor worship was known to that original Aryan stock of which the Romans and Greeks of the West and the Aryan Indians in the East are but divergent branches, and that it was commonly practised by them before such divergence ; the theory of the necessity of a son for the purpose of religious offerings is also a very ancient one, and it seems but natural to suppose that the sages would not throw only the religious sanction about it, but would also try to support it by hemming it around with legal prohibitions.

The next case is V. Singamma *v.* Vinjamuri Venkatacharlu, in which the question does not appear to have been an issue, but

Bittleston and Ellis JJ. pronounced an *obiter dictum* that such an adoption is valid on the authority of the 1 Mad. H.C.R. case. We now come to the case of Narayanaswami *v.* Kuppaswami, 11 Mad. 43, where the question was directly in issue. But the learned Vakil for the appellants, Mr. (now Sir) V. Bhashyam Iyengar, does not appear to have pressed the objection, and their Lordships came to the conclusion that they were concluded by authority. The question did not receive any discussion whatever, and it is left to infer what weight is to be attached to it. The next case from Madras is that which settled the question finally on account of the appellate judgment of the Privy Council, and the High Court judgment in the case is reported in 18 Mad., p. 53, under title Gurulingaswami *v.* Ramalakshmanappa. The question arose directly, and was in fact the principal question to be determined in the case. The question seems to have been argued at some length, but Muthuswami Iyer J. again thought that the question was not *res integra*, and therefore he was concluded by authority, and therefore refused to examine the question again. He says, "There are several Smrutis which forbid such an adoption. They are cited in the leading case on the subject, China Gaunden *v.* Kumara Gaunden, 1 M.H.C.R. 54." We have already noticed what the various Smrutis were that were quoted in the Gounden case. We have seen the counsel for the appellant relied only upon the passage from Mr. Justice Strange's book, and the learned Chief Justice expressly says so at the commencement of his judgment. Hence I fail to see what the Smrutis were that were consulted and examined. Justice Shepherd, who also took part in the case, refused to treat the question as an open one. Hence this does not add to the weight of the original decision. In the course of the argument it seems to have been brought to their Lordships' notice that Turner C.J. and Muttuswami Iyer J., in Ammi Devi *v.* Vikrama Devu, hinted some doubts about the correctness of the decisions, but such doubts were not allowed to prevail by the Judges in the 18 Mad. case in opposition to express decisions to the contrary. Turner C.J. and Muttusawmi Iyer J. are reported to have said, "At the hearing we were inclined to refer the question to a full Bench." But they feared it would be useless as the question was decided in favour of validity, and as a decision of the High Court of Bengal to the same effect was approved by the Privy Council. But they succinctly gave their opinion that there is incapacity in the father to give, and therefore such a gift may not be valid. The conclusion to which the subordinate Judge came is very important and must be noticed. He was of opinion that the adoption of an only son was invalid among *the regenerate classes*, to one of

which the parties, being Kshatriyas, belonged. Here it should be noticed that all the above reported cases, with two more recent ones, which I shall presently mention, were cases between parties who were Sudras, as a reference to the reports would show from the names given therein, and it is only in the 4 M.H.C.R. case that the parties were Brahmins, but there the adoption does not seem to have been that of an only son, the question only being referred to incidentally. The next case is that of the Kalahasti Zamindar who adopted an only son, the Zamindar being a Sudra, and the most recent case Pardhasaradhi Apparao *v.* Rangayyapparao, where Ranee Papammarao, the last holder, adopted an only son, but he being dead the question is dropped. It is a singular and remarkable fact that in all these reported cases, ranging from 1801 down to the present year, there was not a single case of adoption among Brahmins, or even in the three regenerate classes, except in the 11 Madras case, Ammi Devu *v.* Vikrama, where the authority to adopt and the adoption was all a fiction. Now such a state of things cannot be a mere matter of chance, but there is a deep underlying reason for this in the fact that in Southern India, at any rate, as pointed out by Mr. Mayne, custom is much stronger than any written text of law, and people follow their own customs in preference to legal precepts of which they are entirely ignorant. As the statistics of the Presidency show, the Brahmins and the other regenerate classes are only about 10% of the total population, while the remainder is a conglomeration of aboriginal races and Dravidian settlers, who follow customs of their own, peculiar to particular localities and unknown in other parts of the Presidency. Adoption, as described in the Hindu Smruti, being a secular act completely mixed up with religious notions, is not of the same nature in the case of these Sudras. They have no religious ceremonies to be performed; the adopted son does not offer either the periodical or the annual offerings, they are what Sanskritists call Kàrmabahyas. In this state of things it is but natural that they should follow their own ways in preference to anything contained in our Smrutis. Of course if such adoptions were based by our Courts upon express usage to the contrary, the decisions would have been perfectly sound. But when the acts of these people came to be tested by rules of law which were the offspring of religious views, the effect was a twisting and turning of the texts to make them applicable to existing facts. The conclusion of the Subordinate Judge seems to me to correctly and truly represent the way in which the law is understood in these parts. From inquiries I have made, I am able to assert that not a single case of such an adoption had arisen in this Presidency in the case of Brahmins.

We have to a large extent referred to the views in the Privy Council in discussing the Smruti texts themselves, and it is deemed unnecessary to repeat any here, although we shall notice any points remaining untouched before the close of this essay. In Bengal the current of decisions has almost continuously been the other way. In the case of Shumsere Mul *v.* Dilraj Konwur, 2 S.D. 189, the question was referred to the Pandits, although it was not the chief question in the case, and their reply was that in the Dattaka form it is illegal, although it will be valid if it is in the Dwyamushyayam form. In Nundram *v.* Kashee Bandee, 3 S.D.A. 232, decided in 1823, the same question had arisen and the adoption was declared to be illegal, this decision being confirmed on review. The opinion of the Pandits, too, was in the same direction; although one of three Judges that formed the Bench thought such an adoption may be valid, the other two thought otherwise and the decision was according to the majority. It should be noted that this is the case upon which Scotland C.J. relies as an authority for the validity, while the decision is clearly the other way. Next arose the case of Dabee Dial *v.* Hur Hor Sing, 4 S.D.A. 320, in the year 1828, when again the same conclusion was come to, in which the Pandits said, "The fact of his being an only son was sufficient to invalidate the adoption, as such a person was forbidden to be adopted; and the violation of the law was criminal act both on the part of the giver and on the part of the taker." But the only contrary decision in Bengal seems to have been given in Joymony Dossee *v.* Sib Soondari, Fulton's Reports, 75, in the year 1873, by the Supreme Court of Bengal, which however did not affect the case, as they inferred an agreement which brought the case within the Dwyamushyana form. The question was finally determined in 1868 in the case of Opendra Lal *v.* Ranee Bromo, 10 Weekly Reporter, 347. Dwarakanath Mitter J. delivered the judgment of the Bench, holding the adoption to be invalid. After quoting the Dattaka Mimamsa and the Dattaka Chandrika he says, "The passages citied above are sufficient to show that the adoption is forbidden by Hindu Law. It has been said that the prohibition contained in these passages amounts to nothing more than a mere religious injunction, and cannot invalidate the adoption after it has once taken place. We are of opinion that this contention is unsound. It is to be remembered that the institution of adoption, as it exists among the Hindus, is essentially a religious institution. It originated chiefly, if not wholly, from motives of religion, and an act of adoption is to all intents and purposes a religious act, but one of such a nature that its religious and temporal aspects are wholly inseparable. One of the essential requisites of a valid adoption is that the gift should be made by a competent person; and

the Hindu Law distinctly says that the father of an only son has no such absolute dominion over that son as to make him the subject of a sale or gift. The perpetuation of the lineage is the chief object of adoption under the Hindu Law ; and if the adoptive father incurs the offence of extinction of lineage by adopting a child who is the only son of his father, the object of the adoption necessarily fails.'' Before passing to the more important case, *i.e.*, that in 3 Cal. Series, I have to notice the case of Mussamat Tikday *v.* Hurrelal, which is the case of an adoption in the Kritrima form, and which is reported in the Weekly Reporter for 1864 at p. 133. In the case of Kritrima adoption, the adopted son does not leave the natural family, and hence the reason for the rule does not exist. We next come to Manick Chunder Dutt *v.* Bhugobuthy, 3 Cal. 453, where the judgment of the Bench (Garth C. J. and Markby J.), after full argument, was delivered by Markby J. The judgment shows vast research and study, refers to most of the Bengal, Madras Bombay and Punjab decisions, and finds the weight of authority in favour of invalidating the adoption. The various views of commentators and English text writers were also referred to, with the same result. It is also interesting to note that the alternative contention in the case was based on the facts *that the parties were Sudras, and that therefore the rule does not apply*, which contention was however overruled. In this case the opinions of Colebrooke, the two Macnaghtens, and Sutherland, are quoted, which are all against the validity of such an adoption. In the first place we find that Sir Thomas Strange in his Hindu Law, Vol. I, p. 102, refers to the case of Veera Perumal Pillai above referred to as having been based upon comparatively imperfect materials, and the decision has been canvassed with much vigour by Sir F. Macnaghten in his considerations. The opinion of Mr. Colebrooke is quoted by Sir T. Strange to the following effect: '' If a brother's only son be adopted, he need not be taken away from the family of his natural father, but may continue to perform the office of son to both. A valid adoption of an only son cannot otherwise be made, the absolute gift being forbidden.'' Sir F. Macnaghten's conclusions are stated as follows. '' The gift of an only son in adoption is absolutely prohibited ; an only son cannot be given or received in adoption. The gift of an only son is considered to be an inexpiable piacle. It is indeed said that an only son may be so given ; but it might be said in the same sense, that a wicked man may perpetrate any wickedness if he be content to forego all hopes of salvation, and be condemned to everlasting punishment. By the gift of an only son the very deficiency which the power of adoption is intended to prevent must necessarily be occasioned. Nothing

in the Hindu Law is more peremptorily interdicted than the gift of an only son in adoption. Even the gift of an eldest son is prohibited as sinful. The crime of giving away an eldest son is not so serious as that of giving an only son. In the one case, a Hindu retains, in the other he casts away the means of salvation. Considering the precepts and injunctions, both positive and negative, upon this subject, we must be convinced that he who gives his only son in adoption is little less than an apostate from the Hindu religion.'' Sir W. H. Macnaghten gives in Vol. I at p. 67 as his opinion that if the adoption once takes place it cannot be annulled, the injunction being rather against gift than acceptance. But in Vol. II at p. 178 he says, referring to the opinion of a Pandit in the case of the gift of the survivor of two sons: '' It will be observed the answer is not directly in point. The question is, is it legal to adopt a boy under the circumstances, and the reply states that it is illegal to give away a son in such circumstances, but in fact the prohibitory injunction applies as well to the giving as to the receiving, the giver of an only son being considered as parting not only with the sole means of evading eternal torment himself, but as placing his ancestors in the same predicament, and as infringing, therefore, the interests of others whom the law will interpose its authority to protect.'' This seems to annul his former opinion in favour of validity, as suggested by Markby J. Mr. Sutherland's opinion is next quoted as follows, '' An only son cannot become an absolutely adopted son, but he may be affiliated as the son of two fathers. In this case the reason of the prohibition does not apply.'' Hence we have seen that almost all the English text writers are unanimous in denying the the validity of such an adoption. Even of these who have expressed a contrary opinion, Sir T. Strange admits his decision in Veera Perumal Pillai's case is based on imperfect materials, and it is said by some that the opinion of his son, Mr. Justice Strange, quoted supra, is the later opinion of Sir T. Strange. We have seen that Sir W. H. Macnaghten's opinion, too, changed in the same way. Hence all the English text writers were for invalidating the adoption. The state of authorities in Bombay is not quite so uniform. The earliest case that arose was Huebat Row *v.* Govinda Rao, 2 Bom. 75, in the year 1821 It was a case where a man having two sons only gave them both in adoption, and the opinion of the Pandits was to the effect, that although the sin of extinction of lineage lay with the giver, it was not with the receiver, and they therefore pronounced the adoption valid. This was followed by two cases where the adoption of an only son was pronounced to be valid when performed, although it was very improper. The two are Nimbalkar *v.* Jayavantrav, 4 B.H.C.R. (A.C.J.)

193, and Malsabai *v.* Vithoba, 7 B.H.C. App. 26. These two were direct authorities for the position. It should be noticed, however, that Steele, who is an authority in point of customary law in Western India, pronounces that no such adoption could be made, except to the boy's paternal uncle, or with the consent of both, in the Dwyamushyayana form. And in Bhasker Trimbak *v.* Mahadev Ramaji, reported in 6 Bom. H.C.R. (Original Civil) 4, the High Court of Bombay stated that it is a general rule of Hindu Law that an only son cannot be the subject of adoption, and referred to a Calcutta decision as supporting such a rule. In Lakshmappa *v.* Ramava, 12 B.H.C.R. 364, the question arose whether a widow was entitled to adopt an only son, and although the express decision was to the effect that the giving of an only son was at the lowest so very sinful that the husband's permission could not be inferred in such a case as this, still the learned Chief Justice, after a very elaborate examination of the authorities, expressed very strongly against the validity of such an adoption. It should, however, be noticed that on the interpretation of the text of Mitakshara he went wrong, as was pointed above, and this it must be admitted, weakened to a very great extent the strength of his view. It was however merely an *obiter dictum:* as regards Factum Valet the learned Chief Justice stated, "Its proper application must be limited to cases in which there is neither want of authority to give or to accept, nor imperative interdiction of adoption. In cases in which the Shastra is merely directory, and not mandatory, or only indicates particular persons as more eligible than others, the maxim may be usefully and properly applied if the moral precept on recommended preference be disregarded." In the case of Raghubai *v.* Bhagirathi, 2 Bom. 379, the objection was taken by the counsel for the appellants, but seems to have been given up. West J. is reported to have said, "A great conclave of Sastris at Poona declared that, although it might be very wicked in the giver to give an only son, the adoption, if otherwise unobjectionable, was not invalid. Somasekhar *v.* Subadrama, 6 Bom. 523, was a case similar to the 12 Bombay High Court report case, and the Bench, too, was the same Westropp C.J. and Nanabai Haridas J. They of course simply followed the previous case. Then came the case of Ksibai *v.* Tatia, 7 Bom. 225, a case of the adoption of an eldest son, which was pronounced valid, on the ground that none of the objections applicable to the adoption of an only son applied to this adoption.

In 1879 the case appears to have come before a full Bench consisting of Westropp C.J. and M. Melvill, F. I. D. Melvill and Kemball J. J., on an application under Act XXVII of 1860, in the case of the Estate of a deceased Lingayet, and it is stated that an

order was made thereon to the effect that the Court being of opinion that an adoption of an only son by a Lingayet was invalid, reversed the decision. The Registrar's note also says that judgment was to be delivered that under Hindu Law a gift in adoption of an only son was invalid, and that the doctrine of Factum Valet had no application to such a case.'' But no judgment appears to have been given. Hence when the question again cropped up in 1889, directly the question was referred to a full Bench on account of the conflicting views held about the validity of such an adoption. Waman Raghupati *v.* Krishnaji, 14 Bom. 249. Mr. Telang, who appeared for the appellants, and who was also the counsel in the full Bench case in 1879, informed the Court that the question was argued for two days, and the full Bench in this case gave a definite conclusion against the validity of such an adoption. Of course this settled the law in Bombay so far as the Courts were concerned, and in this decision the opinion of Mr. Mandlik was not allowed to prevail. But in 1894 another case cropped up, Raiji Jadav *v.* Bai Mathena, 19 Bom. 658, where the mother was pregnant at the time of giving an only son away in adoption, and the Full Bench case of Bein Prasad *v.* Hardai Bibi was also brought to the Court's notice, but the court refused to disturb settled decisions, and allowed the Full Bench judgment to be applied to its logical conclusion, and hence they held the adoption to be invalid.

In Allahabad the question has a very short history. When the question first arose it was referred to a Full Bench, and the case is reported in 2 All. 164. The majority of the Full Bench, consisting of Stuart C.J., Pearson, Spankie, and Oldfield JJ., held that such an adoption was only sinful and blameable, and not absolutely void, and when once such an adoption had actually taken place, the doctrine of Factum Valet applies, and therefore the adoption stands. Turner J. dissenting held, on the other hand, on the construction of Saunaka, Dattaka Mimamsa and Dattaka Chandrika, that such an adoption was *ab initio* void, and that the doctrine of Factum Valet has no application whatever. He says, ''The consequence of the contrary ruling would be, according to Hindu Law, to inflict a penalty not only on the giver and receiver, but on the collaterals of the receiver, whose property might descend to a person solely entitled to claim it on account of benefits he is presumed to confer, but which he could not possibly confer.'' He also seems to have relied on Colebrooke's translation which, however, it must be admitted, is not accurate, and which consequently weakens the force of his dissenting note. In the next case Tulse Ram *v.* Behari Lal, 12 All. 228, Straight and Mahmood JJ. doubted the correctness of the above full Bench decision, but the case turned on another

question, and hence this question was not gone into. Beni Prasad *v.* Hardai Bibi, 14 All. 67, the case was again referred to a Full Bench consisting of Edge C.J., Straight, Mahmood, and Knox. We have, in considering the original texts themselves, dwelt at length on the views for the validity of the adoption, which are also the same as those expressed by these two learned Judges, and we need not do more than repeat that these Judges were to a large extent influenced by the opinions of Mandlik and Sirkar, which we have already fully discussed. This case went on appeal to the Privy Council, and after full and exhaustive arguments on both sides, in which Mr. Mayne had the peculiar opportunity of appearing on opposite sides in the two cases, the decision was upheld by the Privy Council, which agreed with the Allahabad judgments broadly, except in minor particulars. They expressed themselves about Factum Valet in the way quoted above, and about the reason rule of Mandlik they declined to express an opinion, as they thought they were unable to find the real truth of it. Our examination of the texts shows what points the Privy Council decided as favouring the validity of the adoption. The difference in language in Saunaka's verse was not brought to their Lordships' notice, and the decision is, in the light of the above criticism, unsustainable on the texts quoted.

Two decisions of the Privy Council are relied on as supporting the validity of the adoption, even before the above decision was given. They are, Nilmadoobdas *v.* Bissumbar, 13 M. I. A. 85, and Srimati Uma Debi *v.* Gokulanand, 5 I. A. 40. The learned Chief Justice of the Allahabad High Court in 14 All. says that these are decisions in his favour, but their Lordships of the Privy Council say, "It has been alluded to in two cases, but in so indirect a way that though the authority of the Board is relied on by two sides, it is not available for either." In the first of the above their Lordships said, "If there is on the one hand a presumption that Guru Prasad would perform the religious duty of adopting a son, there is on the other at least a strong presumption that Purmanund would not break the law by giving in adoption an eldest or only son, or allowing him to be adopted, otherwise than as Dwayamushyayana." I am unable to understand how this is an authority in favour of validity. It rather strongly points the other way. In the second case, when the contention was put before their Lordships that the doctrine of Factum Valet is known only to Bengal and foreign to the other schools, their Lordships quoted Madras and Bombay cases where the doctrine was applied. They are no doubt cases of the adoption of an only son, but I do not see how it will follow that their Lordships accepted that the doctrine of Factum Valet applied to such cases. All that their Lordships did was that in

meeting the contention that Factum Valet was unknown in the other schools, they pointed out that it was so applied by the other schools also, without saying in any way whether the Courts were right in thinking that the doctrine was applicable, and much less without saying that it applied in those schools to the particular question. All that their Lordships pointed out was the fact of its having been applied, and they did nothing more.

It remains to notice the course of decisions in Punjab. I was unable to have access to the reports in the Panjab Record, but from their being quoted in Allahabad, I have gathered the following information. Previous to 1868, opinions seem to have been given that such adoptions were invalid, but in the case of Ajoodia Prasad *v.* Mr. Denan (1870), Panjab Record No. 18, p. 56, Simson J. agreeing with the previous decision of the Court held that such an adoption when made will be valid. Lindsay J., however, seems to have thought upon a true construction of the texts of Hindu Law, such adoptions were invalid, but a custom to the contrary having been established on inquiry by the Government, the validity was upheld on that ground. In all the subsequent decisions such adoptions were entirely rested upon custom without any reference whatever to the texts on the subject in Hindu Law. I will simply give the reference to all the cases decided by the Chief Court of Punjab.

Teja Sing *v.* Socket Sing	..	P. R. (1872), p. 73
Hur Sing *v.* Gulaba	..	P. R. (1874), p. 183
Soudan Dewan *v.* M. Subhu	..	(1878), p. 233
Majjasting *v.* Ram Sing	..	56 P. R. 43 of 1879
Hoshnak *v.* Tarmal Sing	..	56 P. R. 57 of 1881
Hoshiney *v.* Jamval Sing	..	(1881), p. 135
Taba *v.* Shibehurn	..	(1883), p. 506
Huhun Sing *v.* Maugal Sing	..	(1886), p. 82
Gandu Mall *v.* M. Rudhi	..	(1886), p. 119

From inquiries I have made, I find that the case of the adoption of an only son never seems to have arisen in the Chief Court of Mysore, or in the High Court of Travancore, and no case on the question is to be found in the Mysore Chief Court Reports, or in the Travancore High Court Reports. One very remarkable point which does not seem to have attracted the attention of the judges in the various cases, or of the two recent writers whose opinions were much relied on, is the existence of the Dvyamushayayana form of adoption, a form in which the adopted son by express agreement continues to be the son of both the natural and the adoptive fathers. To my mind, the very existence of such a form of adoption is proof positive that all the sages held the adoption of an only son to be absolutely prohibited. The

Dvyamushyayana form of adoption would have been quite unnecessary if the adoption of an only son were permitted, for in that case the man having given away an only son to another could have himself adopted another boy ; but it seems to me, that all sages and commentators having thought that the adoption of an only son was invalid, they still thought it necessary to provide for certain contingencies that may arise, and hence they seem to have allowed this form of adoption. The adoption of brother's son is based by Kubera and Nanda Pandita on the Dvyamushyayana form being allowed, and in the particular case the relation is said to arise by reason of the act itself, without an express agreement to the effect. An excellent résumé of the subject is given at pp. 223-224 of Mayne's Hindu Law, Sixth Edition.

Some problems that would naturally arise out of the decision of the Privy Council have been considered in the 12th Volume of the Madras Law Journal. The first question is whether an adopted son who is, of course, an only son, can be given away. On principle it should be so, for if the natural father of an only son has, in spite of the express texts to the contrary, an absolute power of disposition over the son, and if by adoption the son is transferred to the adoptive father, all the rights of the natural father must necessarily pass to the adoptive father, and hence the adoptive father should also have powers of disposal over him, and his being an only son being no objection to the gift of him, according to the Privy Council decision, he is a fit and proper subject of adoption ; but the writer of the article comes to a different conclusion, as the word (son) must be taken in its primary and not in its secondary significance. At any rate, the result shows how awkward the logically following out the decision is, and it not a little reflects upon the correctness of the decision. Again another question that is discussed is whether the father, after giving away his only son in adoption, can again adopt another, and the answer given is that he can. It does certainly look as if it is perverting the law to allow a man to part with his son and then to go about for adopting another, but still this is the logical result of allowing a man to give away an only son. Although the learned authors Mandlik and Sirkar lay much stress upon there being other modes of a man obtaining salvation, or Moksha, still one of the chief and imperative duties of every man is the performance of religious ceremonies in the names of the ancestors, and any discontinuance of it is looked upon as very grievous, and I have no doubt that in this part of the country, at any rate, a wilful neglect of this duty is punished by Amksha from the spiritual guru of the community.. Hence the popular opinion is universally in favour of continuing these rites

at stated intervals, and every effort is made to secure a person for their performance. Hence even if a man gives away his only son, he still has to recur to the method of affiliating a son, for the purpose of satisfying the manes of his ancestors. But it is clear how ludicrous the result of allowing such a thing is. This too in my opinion goes to prove the incorrectness of the decision. See 12 Madras Law Journal, p. 117 *et seq.*